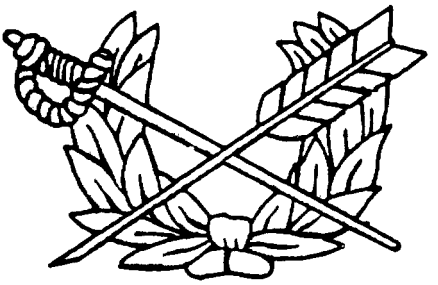

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MILITARY LAW REVIEW

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SPYING IN VIOLATION OF ARTICLE 106, UCMJ: THE OFFENSE AND THE CONSTITUTIONALITY OF ITS MANDATORY DEATH PENALTY

by Major David A. Anderson*

"In my opinion the spy is the greatest of soldiers: if he is the most detested by the enemy it is only because he is the most feared."[1]
—King George V

"One spy in the right place is worth 20,000 men in the field."[2]
—Napoleon

I. INTRODUCTION

In today's society, would Captain Nathan Hale, American officer and revolutionary patriot, or Major John Andre, British officer and revolutionary patriot, be sentenced to hang? In 1776, at the beginning of America's Revolutionary War, Captain Hale volunteered to *go* behind British lines to spy on the enemy; he was captured in the disguise of a Dutch school teacher, and the following day he was hanged.[3] General Henry W. Halleck, General-in-Chief of the Union Armies from 1862 to 1864,[4] described Captain Hale's mission and fate in these terms:

> After the retreat of Washington from Long Island, Captain Nathan Hale re-crossed to that island, entered the British lines,

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[1] B. Newman, Epics of Espionage 7 (1951).

[2] *Id.*

[3] *See* I. Stuart, Life of Captain Nathan Hale: The Martyr-Spy of the American Revolution (Hartford 1856); H. Halleck, International Law; or, Rules Regulating the Intercourse of States in Peace and War 407 (New York 1861); H. Johnston, Nathan Hale, 1776: Biography and Memorials (1901); J. Root, Nathan Hale (1915); J. Darrow, Nathan Hale: A Story of Loyalties (1932); M. Pennypacker, George Washington's Spies on Long Island and in New York (1939); 2 L. Oppenheim, International Law 425 (7th ed. 1952).

[4] *The Beginnings: Halleck on Military Tribunals*, Mil. L. Rev. Bicent. Issue 13 (1975).

> *in disguise*, and obtained the best possible intelligence of the enemy's forces, and their intended operations; but, in his attempt to return, he was apprehended, and brought before Sir William Howe, who gave immediate orders for his execution *as a* spy; and these orders were carried into execution the very next morning, under circumstances of unnecessary rigor, the prisoner not being allowed to see a clergyman, nor even the use of a bible, although he respectfully asked for both.[5]

During that same war four years later, Major John Andre was captured behind American lines in civilian clothes and hanged as a spy.[6] His story has been summarized as follows:

> John Andre . . . joined the British army in Canada and became aide-de-camp to Gen. Sir Henry Clinton. [General]Benedict Arnold, an American commandant, [undertook] to surrender a certain fortress, [West Point], to the British forces[.] Andre was sent by Clinton to make the necessary arrangements for carrying out this engagement. Andre met Arnold near the Hudson on the night of September 20, 1780;then Andre put on civilian clothes, and by means of a passport given to him by Arnold in the name of John Anderson he was to pass through the American lines. Approaching the British lines, he was captured and handed over to the American military authorities. A [Board of General Officers] summoned by [General George] Washington convicted him of [spying] and declared that 'agreeably to the laws and usages of nations he ought to suffer death.' He was hanged October 2, 1780; but in [England] he was considered a martyr . . . .[7]

According to tradition, just prior to his death, Captain Hale declared, "I only regret that I have but one life to lose for my country."[8] In a similar vein, when Major Andre was on the gallows, he

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[5] H. Halleck, *supra* note 3, at 407.

[6] *See* Proceedings of a Board of General Officers, Held by Order of His Excellency Gen. Washington, Commander in Chief of the Army of the United States of America, Respecting Major John Andre, Adjutant General of the British Army (Philadelphia 1780); E. Benson, Vindication of the Captors of Major Andre (New York 1817); H. Halleck, *supra* note 3, at 408-09; W. Sargent, The Life of Major Andre, Adjutant-General of the British Army in America (1871); Halleck, ***Military Espionage,*** *5* Am. J. Int'l L. 590, 594-603 (1911): 2 H. Wheaton, Wheaton's International Law 219-20 (7th ed. 1944) (1st ed. 1836); 2 L. Oppenheim, supra note 3, at 423-24; R. Hatch, Major John Andre: A Gallant in Spy's Clothing (1986).

[7] 2 H. Wheaton, *supra* note 6, at 219.

[8] *See* H. Johnson, *supra* note 3, at 126; J. Root, *supra* note 3, at 86; J. Darrow, supra note 3, at 214; I. Stuart, supra note 3, at 134.

observed, "I die for the honour of my king and country."[9] Despite the fact that both Captain Hale and Major Andre were considered fearless officers, fine gentlemen, and noble patriots,[10] they both suffered the standard punishment prescribed by law at the time for the offense of spying, death!' Confinement and a later exchange of captured spies was not an option; the common law would not permit it.[12] Once confirmed as a spy, a man's death warrant was virtually sealed.[13]

From the Revolutionary War to the present, Americans have had little tolerance for spies.[14] During World War 11, for instance, eighteen German soldiers were captured during the Battle of the Bulge, attempting to disrupt American operations while wearing American uniforms behind enemy lines; all were tried before military commissions, convicted of spying, sentenced to death, and executed.[15] Currently, article 106 of the Uniform Code of Military Justice (UCMJ) mandates that anyone convicted of spying shall suffer death.[16] The offense of spying is unique among the punitive articles in the UCMJ; it is the only offense for which death is the mandatory punishment.[17]

Over time, civilization in America has progressed and traditions have changed, but the punishment for spying has remained the same. This article will examine the offense of spying and determine whether, under the judicial scrutiny of the U.S. Supreme Court and the U.S. Court of Military Appeals and the dictates of modern international law, the mandatory death penalty for the offense is still required. To resolve this issue, three major areas will be discussed: the historical background of the offense of spying and its punishment; judicial precedents from the Supreme Court and the Court of Military Appeals concerning the death penalty and mandatory punishments; and the status of spying under current international law and opin-

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[9]1 H. Halleck, Halleck's International Law 630 (4th ed. 1908) (1st ed. 1861).

[10]J. Root, *supra* note 3, at 152-60.

[11]H. Halleck, *supra* note 3, at 407-09; W. Winthrop, Military Law and Precedents 765-66, 770-71 (2d ed. 1920 reprint).

[12]Gen. Orders No. 100, War Dep't (24 Apr. 1863).

[13]H. Halleck, *supra* note 3, at 407-09; W. Winthrop, *supra* note 11, at 765-66, 770-71.

[14]*See* H. Halleck, *supra* note 6, at 590; *Ex parte* Quirin, 317 U.S. 1, 42 n.14 (1942); Dep't of Army, Pam. 27-161-2, International Law, Volume II, at 59 (23 Oct. 1962) [hereinafter DA Pam. 27-161-2].

[15]C. MacDonald, A Time for Trumpets 226 (1985); Koessler, ***International Law on Use*** d *Enemy* ***Uniforms*** as *a* ***Stratagem*** *and* ***the Acquittal in the Skorzeny*** Case, 24 Mo. L. Rev. 16, 29-30 (1959).

[16]Uniform Code of Military Justice art. 106, 10 U.S.C. § 906 (1982) [hereinafter UCMJ].

[17]*See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 921(c)(2)(A) discussion [hereinafter R.C.M. 921(c)(2)(A) discussion].

ion. In the end, the fate that would befall Captain Hale and Major John Andre in today's world for their crime of spying will have a definitive answer.

11. HISTORY OF THE OFFENSE AND ITS PUNISHMENT

A. AMERICAN STATUTORY PRECEDENT

Spying first became an offense in the United States during the Revolutionary War.[18] On August 21, 1776, the Continental Congress enacted the following resolution:

> That all persons, not members of, nor owing any allegiance to, any of the United States of America, . . . who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct.[19]

This legislation differs from the statutory provision currently in force in two major respects. First, under this resolution, the offense of spying could only be committed by aliens. In other words, U.S. citizens did not fall within the scope of the offense.[20] Second, and more importantly, the punishment for spying was not a mandatory death sentence.[21] To the contrary, a court-martial had the discretion to award death or "such other punishment" as it directed. Thus, the earliest U.S. legislative provision to deal with spying, the one adopted by America's founding fathers, did not require the imposition of the death penalty for the offense, but rather delegated the determination of an appropriate sentence to the members of the court.

The next statutory provision to delineate the offense of spying did provide for a mandatory death sentence. That provision, enacted by the U.S. Congress on April 10, 1806, was included as part of "An Act

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[18] W. Winthrop, supra note 11, at 765; *Ex parte* Quirin, 317 U.S. 1, 41 (1942).

[19] Resolution quoted in W. Winthrop, supra note 11, at 765, and cited at 765 n.88 as 1 Jour. Cong. 450.

[20] W. Winthrop, supra note 11, at 766; see also I. Maltby, A Treatise on Courts-Martial and Military Law 35-36 (Boston 1813); Gen. Orders No. 39, HQ, Dep't of the Mo. (23 May 1863).

[21] W. Winthrop, supra note 11, at 766.

For establishing Rules and Articles for the government of the Armies of the United States," and it was inserted directly after the "Articles of War."[22] It read as follows:

> That in time of war, all persons not citizens of, or owing allegiance to the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.[23]

Not only did this provision provide for a mandatory death penalty, it also required that all spying offenses be tried by general courts-martial.[24] The provision maintained the earlier language that limited the commission of the offense to aliens; U.S. citizens could not come within the scope of the offense.[25]

The law against spying remained the same until the Civil War.[26] In 1862 Congress redrafted the law to accommodate the circumstances of a war between U.S. citizens:[27]

> That, in time of war or rebellion against the supreme authority of the United States, all persons who shall be found lurking as spies, or acting as such, in or about the fortifications, encampments, posts, quarters, or headquarters of the armies of the United States, or any of them, within any part of the United States which has been or may be declared to be in a state of insurrection by proclamation of the President of the United States, shall suffer death by sentence of a general court-martial.[28]

No longer was the spy statute only applicable to aliens. Under the new statutory language, "all persons" were subject to conviction, including U.S. citizens.[29] The purpose of the change was to allow the

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[22] Act of April 10, 1806, ch. 20, § 2, 2 Stat. 371 (1806); *see also* I. Maltby, *supra* note 3, at 199-200; W. Winthrop, *supra* note 11, at 766.
[23] Act of April 10, 1806, ch. 20, § 2, 2 Stat. 371 (1806).
[24] W. Winthrop, *supra* note 11, at 766.
[25] *Id.*
[26] *Id.*
[27] W. Winthrop, *supra* note 11, at 766; Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862).
[28] Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862).
[29] Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862); *see* W. Winthrop, *supra* note 11, at 766.

law to include "the class which would naturally furnish the greatest number of offenders, *viz*, officers and soldiers of the confederate army and civilians in sympathy therewith."[30] In addition, the "in time of war" requirement of the offense was broadened to include a time of "rebellion against the supreme authority of the United States."[31]

The jurisdiction of this 1862 spy law was restricted to offenses committed "within any part of the United States which has been or may be declared to be in a state of insurrection by proclamation of the President."[32] A year later, in 1863, Congress rewrote the statute and deleted this restrictive language.[33] The jurisdiction of the statute was expanded back to its original scope. The 1863 enactment also provided an additional forum in which to try a person accused of spying, a military commission.[34] In both the 1862 and 1863 versions of the spy statutes, the mandatory death penalty survived without modification.[35]

In 1873 Congress reenacted all the general and permanent U.S. statutes then in force and consolidated them into a volume entitled *Revised Statutes of the United States*.[36] The 1863 spy statute was reenacted as section 1343 of the Revised Statutes and was virtually identical to its predecessor.[37] This provision would remain unchanged until 1920 and stated:

> All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.[38]

At approximately the same time in 1862 that Congress was refining the statutory definition of spying for the "armies of the United

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[30] W. Winthrop, *supra* note 11, at 766.
[31] Act. of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862).
[32] *Id.*
[33] Act of March 3, 1863, ch. 75, § 38, 12 Stat. 736 (1863).
[34] *Id.*
[35] Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862); Act of March 3, 1863, ch. 75, § 38, 12 Stat. 737 (1863).
[36] Rev. Stat. (2d ed. 1878).
[37] Rev. Stat. § 1343 (2d ed. 1878).
[38] *Id.*

States,''[39] it also undertook to draft an offense of spying for the Navy. This offense, enacted as article 4 of the Articles for the Government of the Navy of the United States, prohibited the following conduct:

> Spies, and all persons who shall come or be found in the capacity of spies, or who shall bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the navy to betray his trust, shall suffer death, or such other punishment as a court-martial shall adjudge.[40]

As clearly evident from its language, this spy statute did not mandate the death penalty, but rather allowed a court-martial the discretion to award death or "such other punishment" as it deemed appropriate. In this regard, the Navy spy provision was identical to the original legislation passed on the subject of spying by the Continental Congress.[41] The Navy spy statute, however, was at odds with the Army spy statute then in force on the matter of a mandatory death penalty.[42] This conflict between the Navy's discretionary punishment for spying and the Army's mandatory punishment for spying would continue until the passage of the Uniform Code of Military Justice in 1950.[43] As rewritten in the Revised Statutes of 1873[44] and later codified in Title 34 of the U.S. Code as article 5 of the Articles for the Government of the Navy,[45] the Navy spy statute did in other respects closely resemble the Army spy law:

> All persons who, in time of war, or of rebellion against the supreme authority of the United States come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court-martial may adjudge.[46]

As noted above, the Army spy law remained constant from 1863 to 1920 when it was finally incorporated within the Articles of War as article 82.[47] The only substantive change made in 1920 was to eliminate the outdated Civil War language concerning ''rebellion

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[39] Act of Feb. 13, 1862, ch. 25, § 4, 12 Stat. 340 (1862).
[40] Act of July 17, 1862, ch. 204, art. 4, 12 Stat. 602 (1862).
[41] *See* W. Winthrop, *supra* note 11, at 765.
[42] *See* Act of Feb. 13, 1862, ch. 25, § 2, 12 Stat. 340 (1862).
[43] *See* 50 U.S.C. § 700 (1952).
[44] Rev. Stat. § 1624 (2d ed. 1878).
[45] 34 U.S.C. § 1200 (1940).
[46] *Id.*
[47] Act of June 4, 1920, ch. 227, 41 Stat. 804 (1920).

against the supreme authority of the United States.''[48] The 1920 change did not restore the pre-Civil War aliens-only application of the offense. The "All persons" language of the 1863 statute was changed to ''Any person" in the 1920 version, but the offense maintained its applicability to U.S. citizens as well as aliens. Article 82, codified in Title 10, U.S. Code,[49] read as follows:

> Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.[50]

In 1950, in an effort to "unify, consolidate, revise, and codify" the Articles of War and the Articles for the Government of the Navy, Congress enacted and established a Uniform Code of Military Justice.[51] The Army spy statute, Article of War 82, and the Navy spy statute, article 5, Articles for the Government of the. Navy, were merged into one spy statute applicable to all the uniformed services.[52] The language of the new spy law was derived from Article of War 82, not from article 5.[53] As such, the new law retained the mandatory death penalty provision. The only difference between Article of War 82, and the new spy law, article 106, UCMJ, was that the scope of the new article was enlarged to accommodate Navy vessels, shipyards, military aircraft, and any manufacturing or industrial plant engaged in supporting a war effort.[54] As codified in Title 50 of the U.S. Code, the unified spy statute took the following form:

> Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a

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[48] *Compare* Rev. Stat. § 1343 (2d ed. 1878) ***with*** Act of June **4,** 1920, ch. 227, 41 Stat. 804 (1920).

[49] 10 U.S.C. § 1554 (1940).

[50] Act of June 4, 1920, ch. 227, 41 Stat. 804 (1920).

[51] Act of May 5, 1950, ch. 169, 64 Stat. 107 (1950).

[52] *Uniform Code of* ***Military Justice: Hearings on*** *H.R.* ***2498 Before*** *a Subcomm. of* ***the House*** *Comm. on* Armed ***Services,*** 81st Cong., 1st Sess. 1229 (1949) [hereinafter ***Hearings].***

[53] *Id.*

[54] *Id.*

> military commission and on conviction shall be punished by death.[55]

Although some concern was voiced in the legislative history of article 106, UCMJ, about the language of the provision being too broad and about civilians in wartime being subject to trial by court-martial or military commission, no concern or comment was raised about the mandatory death penalty.[56]

Finally, in 1956, article 106, UCMJ, was enacted in its current form and codified in Title 10 U.S. Code:[57]

> Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.[58]

The only change from the previous law was the omission of the words "of the United States" as surplusage.[59]

The statutory development of article 106, UCMJ, reveals two important points. First, the initial spy statute in the United States drafted by the Continental Congress did not require a mandatory death sentence.[60] Second, the spy law drafted by Congress for the U.S. Navy in 1862 and in effect until 1950 did not provide for a mandatory death sentence.[61] This law was in direct opposition to the U.S. Army spy statute in effect from 1806 to 1950, which did provide for a mandatory death sentence.[62] The anomaly created by these con-

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[55] 50 U.S.C. $ 700 (1952).

[56] *Hearings*, *supra* note 52, at 695-96 (statement of John J. Finn, Judge Advocate, District of Columbia Department of the American Legion); *id.* at 844 (statement of Arthur J. Keefe, Professor, Cornell Law School); H.R. Rep. No. 491, 81st Cong., 1st Sess. 126-27 (1949).

[57] Act of Aug. 10, 1956, ch. 1041, 70A Stat. 71 (1956).

[58] 10 U.S.C. § 906 (1982).

[59] *See* 10 U.S.C.S. § 906 (Law. Co-op. 1985).

[60] W. Winthrop, supra note 11, at 765-66.

[61] Act of July 17, 1962, ch. 204, 12 Stat. 602 (1862); Rev. Stat. § 1624 (2d ed. 1878); 34 U.S.C. § 1200 (1940).

[62] Act of April 10, 1806, ch. 20, § 2, 2 Stat. 371 (1806); Act of Feb. 13, 1862, ch. 25, § 4, 2 Stat. 340 (1862); Act of March 3, 1863, ch. 75, § 38, 12 Stat. 736 (1863); Rev. Stat. § 1343 (2d ed. 1878); Act of June 4, 1920, ch. 227, 41 Stat. 804 (1920); 10 U.S.C. § 1554 (1940).

flicting statutes was that if a person committed an act of spying against the U.S. Army, he would automatically receive a death sentence, but if that same person committed the same crime against the U.S. Navy, his punishment was left to the discretion of a court-martial. The Uniform Code of Military Justice resolved this anomaly in favor of the mandatory punishment. In so doing, however, Congress discarded a century-old Article for the Government of the U.S. Navy and rejected the precedent established by America's founding fathers in 1776.

B. HISTORICAL NATURE OF THE OFFENSE

In 1863 the first codification of the laws of land warfare issued to a national army was published for the U.S. Army as General Orders No. 100.[63] Prepared by Professor Francis Lieber, and popularly known as the Lieber Code, this code defined the meaning of being a spy and set forth the punishment for the offense.[64] Paragraphs 83, 88, 103, and 104 of the Lieber Code provided the basic principles governing a spy:

> 83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.
> 88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.
> The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.
> 103. Spies . . . are not exchanged according to the common law of war.
> 104. A successful spy . . . safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy . . . , but he may be held in closer custody as a person individually dangerous.[65]

At the time he wrote the code, Lieber had few written interna-

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[63] Gen. Orders No. 100, War Dep't (24 Apr. 1863); Gamer, *General Order 100 Revisited*, 27 Mil. L. Rev. 1 (1965); Root, *Francis Lieber*, 7 Am. J. Int'l L. 453 (1913).

[64] Gen. Orders No. 100, War Dep't (24 Apr. 1863); Garner, *supra* note 63, at 1-5, 12-14; Root, *supra* note 63, at 453-58.

[65] Gen. Orders No. 100, paras. 83, 88, 103-04, War Dep't (24 Apr. 1863).

tional law treatises from which to draw his ideas.[66] Perhaps the most influential book to discuss spying at the time was Vattel's *The Law of Nations*, written in 1758.[67] Vattel's views on spying were important not only for their influence on Lieber, but also for their influence on other international law commentators as well.[68] Vattel wrote this early summary on spies:

> The employment of spies is a kind of clandestine practice or deceit in war. These find means to insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then give intelligence to their employer. Spies are generally condemned to capital punishment, and with great justice, since we have scarcely any other means of guarding against the mischief they may do us. For this reason, a man of honour, who is unwilling to expose himself to an ignominious death from the hand of a common executioner, ever declines serving as a spy; and, moreover, he looks upon the office as unworthy of him, because it cannot be performed without some degree of treachery. The sovereign, therefore, has no right to require such a service of his subjects, unless, perhaps, in some singular case, and that of the highest importance.[69]

Lieber and Vattel agreed on five aspects of spying. First, the act of spying could only occur during the time of war. Second, the spy is a "person." Use of the word "person" meant that a spy may be either a military member or a civilian. Because a spy need only be a person, then "it is not essential that [he] be a member of the army or resident of the country of the enemy: he may be a citizen or even a soldier of the nation or people against whom he offends, and, at the time of his offense, legally within their lines."[70] Also, a spy who is solely a "person" "may either be an emissary of the enemy or one acting on his own accord."[71] Third, Lieber and Vattel agreed that a spy must act clandestinely, in disguise, or under false pretenses. The clandestine nature of the spy and the deception involved "constitute the gist" and, concurrently, the "aggravation" of the offense.[72] Fourth, they concluded that a spy must seek information from the

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[66] Garner, *supra* note 63, at 4. See *also* E. Vattel, The Law of Nations (J. Chitty ed. 1883) (1st ed. 1768); H. Halleck, *supra* note 3.
[67] E. Vattel, *supra* note 66.
[68] *See* H. Halleck, supra note 3, at 406-07; 2 L. Oppenheim, *supru* note 3, at 421.
[69] E. Vattel, *supra* note 66, at 375.
[70] W. Winthrop, *supru* note 11, at 767.
[71] *Id.*
[72] *Id.*

enemy with the intent of passing the information on to the opposing side. Finally, both men concurred that death is an appropriate punishment for a spy.

Regarding punishment, Vattel asserted that spies are "generally" condemned to death. He specifically did not mandate death for the offense. The Lieber Code, on the other hand, did require death for the offense. At the time Lieber drafted his code, however, he was constrained in this area by two factors. First, his code was written during the American Civil War, when the offense of spying was a widespread problem,[73] and second, when his code was promulgated in 1863 the spying statute in effect for the armies of the U.S. mandated the death penalty for a spy.[74] Lieber, then, had little choice on the issue of punishment. Vattel's view certainly more closely reflected the international attitude. The German international law commentator, Bluntschli, inspired by Lieber and his codification of the Articles of War,[75] expressed the attitude of the time concerning the punishment for spying in his *Code of International Law* published in the late 1800's:

> The reason for the severe punishment of spies lies in the danger in which they place the military operations, and in the fact that the measures to which they resort are not considered honorable—not because they indicate a criminal inclination. If acting under the orders of their government, they may well believe that they are fulfilling a duty; and they may be impelled by patriotic motives when acting of their own free will. The object of the death penalty is to deter by fear. The customs of war, indeed, prescribe hanging. Nevertheless it should only be resorted to as an extreme measure in the most aggravated cases; it would in most cases be out of all proportion to the crime. In modern practice it is treated more leniently, and a milder punishment, generally imprisonment, is now imposed . . . . The threat of the death penalty may be necessary, but it can be carried into execution only in aggravated cases of positive guilt.[76]

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[73] *See* Kane, Spies for the Blue and Gray 11-16 (1954).

[74] *See* Act of March 3, 1863, ch. 75, § 38, 12 Stat. 736 (1863).

[75] Root, *supra* note 63, at 457-58. Bluntschli is quoted by Root at 458 as saying: "These instructions prepared by Lieber, prompted me to draw up, after his model, first, the laws of war, and then, in general, the law of nations, in the form of a code, or law book, which should express the present state of the legal consciousness of civilized peoples."

[76] J. Bluntschli, Code of International Law 78-79 (G. Lieber trans. n.d.) (translation located in rare book room of TJAGSA library, Charlottesville, VA).

From Bluntschli's writings, it is clear that by the late 1800's, international law did not in all cases prescribe the death penalty for spying. Although the death penalty was a permissible punishment for that offense, it was an "extreme measure" to be used only in the "most aggravated cases."[77] Punishment was intended to fit the crime, and a term of years in prison, instead of a death sentence, was seen as entirely proportional to many spy offenses.[78]

The Lieber Code served as a guide for the Hague Conventions of 1899 and 1907, conventions held to declare for the international community the laws and customs of war on land.[79] In the Annex to the Hague Convention No. IV of October 18, 1907, regulations were adopted relating to spies.[80] The United States was a signatory to that treaty, the U.S. Senate ratified it in 1909, and it is still in force.[81] The pertinent four Hague Regulations that relate to the offense of spying are:

> Article **24.** Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.
>
> Article 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.
>
> Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.
>
> Article 30. A spy taken in the act shall not be punished without previous trial.
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> Article 31. A spy who, after rejoining the army to which he

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[77] *Id.*

[78] *Id.*

[79] Root, *supra* note **63,** at 457; Garner, *supra* note **63,** at 2.

[80] Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex thereto Embodying Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, **T.S.** No. 539 [hereinafter Hague Convention No. IV].

[81] *Id.*

> belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.[82]

The definition of a spy in the Hague Regulations mirrors that of the Lieber Code, except for one major discrepancy. To qualify as a spy under article 29 of the Hague Regulations, a person must collect or attempt to collect information "in the zone of operations of a belligerent."[83] Paragraph 88 of the Lieber Code has no such territorial limitation.[84] Thus, a Hague Convention spy would only be guilty if the spying activity occurred at or near the field of battle, while a Lieber Code spy could commit the act of spying at any situs, whether near the area of actual military operations or not.

In addition to the definition of spying, the Lieber Code and the Hague Regulations coincide on two other concepts. Both agree that a soldier, not in disguise, who has entered the zone of operations of the opposing army only seeking to obtain information, is not a spy.[85] Also, both agree that a military spy is immune from prosecution for the offense of spying if he is able to return to his own army before being captured.[86]

Two matters concerning the offense of spying that were either implied or understood in the Lieber Code are explicitly stated in the Hague Regulations. First, article 24 of the Hague Regulations recognizes that spying is not a violation of the law of war by providing that "the employment of measures necessary for obtaining information about the enemy and the country are considered permissible" under international law.[87] Lieber had implied the same concept in paragraph 101 of his code when he wrote that "deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare."[88] Article 24 simply clarified the area and left no doubt as to the legality of a country using spies in war.[89]

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[82] *Id.* annex arts. 24, 29-31, 36 Stat. 2277, 2302-04. See *also* Dep't of Army, Pam. 27-1, Treaties Governing Land Warfare, at 8, 13-14 (7 Dec. 1956) [hereinafter DA Pam. 27-1].

[83] *See* Garner, *supra* note 63, at 12; DA Pam. 27-161-2, at 59; Dep't of Army, Field Manual 27-10, The Law of Land Warfare, para. 76 (18 Jul. 1956) [hereinafter FM 27-10].

[84] Garner, *supra* note 63, at 12; DA Pam. 27-161-2, at 59.

[85] Gen. Orders No. 100, para. 83, War Dep't (24 Apr. 1863); Hague Convention No. IV, annex art. 29, 36 Stat. 2277, 2303-04. See Garner, supra note 63, at 13.

[86] Gen. Orders No. 100, para. 104, War Dep't (24 Apr. 1863); Hague Convention No. IV, annex art. 31, 36 Stat. 2277, 2304. See W. Winthrop, *supra* note 11, at 770; Garner, *supra* note 63, at 14.

[87] Hague Convention No. IV, annex art. 24, 36 Stat. 2277, 2302.

[88] Gen. Orders No. 100, para. 101, War Dep't (24 Apr. 1863).

[89] FM 27-10, para. 77.

Consequently, "[s]pies are in no sense dishonorable."[90] Lieber made clear that spies are punished, not as violators of the law of war, but because "they are so dangerous, and it is so difficult to guard against them."[91] "Punishment of captured spies is permitted as an act of self-protection, the law equally permitting the one to send spies, the other to punish them if captured."[92]

Second, article 30 of the Hague Regulations requires that a spy receive a trial before he may be punished.[93] Although the Lieber Code never mentioned the requirement of a trial for a spy, at the time the code was drafted during the American Civil War the spy statute in effect for the armies of the U.S. did require a trial by general court-martial for the offense,[94] and both the Union and the Confederacy did in actual practice provide trials for spies.[95] Article 30 was intended to ensure against abuses of the general practice.[96]

The Hague Regulations legitimized the use of spying in wartime and required a trial for any captured spy before punishment could be imposed, but they failed to provide any guidance whatsoever as to an appropriate punishment for the offense. When the Hague Regulations were developed and ratified in the early 1900's, the most persuasive American precedent on military law was Colonel William Winthrop's treatise, *Military Law and Precedents*.[97] In his treatise, Winthrop discussed the punishment for the spy, and his writings acknowledged the Vattel/Bluntschli standard while noting the American statutory constraint placed on Lieber: "By the law of nations the crime of the spy is punishable with death, and by our statute this penalty is made mandatory upon conviction."[98] From this statement, it is clear that, in Winthrop's opinion, death was not a mandatory punishment for spying in the international community, only a permissive one; the U.S. requirement for mandatory death was a consequence of statute rather than the law of nations. Winthrop noted further that even the American mandate for death in the case

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[90] 2 H. Wheaton, *supra* note 6, at 218-19; DA Pam. 27-161-2, at 58.
[91] Gen. Orders No. 100, para. 101, War Dep't (24 Apr. 1863).
[92] DA Pam. 27-161-2, at 58.
[93] Hague Convention No. IV, annex art. 30, 36 Stat. 2277, 2304.
[94] Act of March 3, 1863, ch. 75, § 38, 12 Stat. 736 (1863).
[95] *See* Kane, Spies for the Blue and Gray (1954); Gamer, *supra* note 63, at 13.
[96] Garner, *supra* note 63, at 13-14. *See also* W. Winthrop, *supra* note 11, at 770 ("It has always been legal . . . to proceed *summarily without trial* against spies . . . . Modern codes, however, call for a trial of the offender.").
[97] W. Winthrop, *supra* note 11.
[98] *Id.* at 770 (Vattel and Lieber are cited as the references for Winthrop's statement at 770 n.29).

of a spy was not always followed—at least for women.[99] On this subject, he commented: "In some instances, women (who, by reason of the natural subtlety of their sex, were especially qualified for the *role* of the spy,) were sentenced to be hung as spies, though in their case this punishment was rarely if ever enforced."[100]

Colonel Winthrop took no personal position on whether the death penalty should be mandatory or permissive for the offense of spying. He did, however, offer an extended commentary on why death was an acceptable punishment for the offense.[101] This commentary, although almost a century old, remains timely:

> It may be observed, however, that the extreme penalty is not attached to the crime of the spy because of any peculiar depravity attaching to the act. The employment of spies is not unfrequently resorted to by military commanders, and is sanctioned by the usages of civilized warfare; and the spy himself may often be an heroic character. A military or other person cannot be required by an order, to assume the office of spy; he must *volunteer* for the purpose; and where so volunteering, not on account of special rewards offered or expected, but from a courageous spirit and a patriotic motive, he generously exposes himself to imminent danger for the public good and is worthy of high honor. Where indeed a member of the army or citizen of the country assumes to act as a spy against his own government in the interest of the enemy, he is chargeable with perfidy and treachery, and fully merits the punishment of hanging; but—generally speaking— the death penalty is awarded this crime because, on account of the secrecy and fraud by means of which it is consummated, it may expose an army, without warning, to the gravest peril; and, as Vattel observes, "[since we have scarcely any other means of guarding against the mischief they may do us]."[102]

Winthrop differentiated two types of spies: the honorable spy, who works on behalf of his country, is a person of great courage and patriotism, and deserves high honor; and the dishonorable spy, who works for the enemy against his own country, is a person of great treachery, and deserves hanging. According to Winthrop, despite the

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[99] *Id.* at 771.
[100] *Id.*
[101] *Id.*
[102] *Id.*

qualitative difference in character between the two individuals, both were subject to receiving the death penalty in order to deter an act that could result in the loss of an entire army. Winthrop left unsaid, however, whether he believed the honorable spy, although subject to a capital penalty, should receive an automatic death sentence, without consideration of his character.

C. UCMJ/MCM DEFINITION AND SCOPE

Five elements must be proven to sustain a conviction for the offense of spying under article 106, UCMJ.[103] These elements are:

> (1) That the accused was found in, about, or in and about a certain place, vessel, or aircraft within the control or jurisdiction of an armed force of the United States, or a shipyard, manufacturing or industrial plant, or other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere;
> **(2)** That the accused was lurking, acting clandestinely or under false pretenses;
> **(3)** That the accused was collecting or attempting to collect certain information;
> **(4)** That the accused did so with the intent to convey this information to the enemy; and
> ***(5)*** That this was done in time of war.[104]

The definition of spy in article 106, UCMJ, resembles the one in the Lieber Code more so than the one in the Hague Regulations. As noted earlier, the Lieber Code definition and the Hague Convention definition differed only in one major factor, location of the offense. The same difference is carried over into the UCMJ. By the Hague definition, to qualify as a spy a person must obtain or seek to obtain information within the "zone of operations."[105] No such limitation exists in article 106, UCMJ. Under article 106 a person can commit the offense within the zone of operations or "elsewhere."[106]

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[103] Manual for Courts-Martial, United States, 1984, Part IV, para. 30b(1)-(5) [hereinafter MCM, 1984].

[104] *Id.* para. 30(b)(1)-(5).

[105] Hague Convention No. IV, annex art. 29, 36 Stat. 2277, 2303-04.

[106] UCMJ art. 106. See FM 27-10, para. 76. See also FM 27-10, para. 75c ("Insofar as Article 29, HR, and Article 106, Uniform Code of Military Justice, are not in conflict with each other, they will be construed and applied together. Otherwise Article 106 governs American practice.").

Although facially straightforward, the five elements of spying in article 106 reveal, on closer examination, certain definitional problems. First, spying can only occur if committed during a "time of war."[107] Nowhere in the UCMJ, however, is "time of war" defined, and there are no reported cases that have construed that phrase for purposes of article 106.[108] To define "time of war" for article 106, it is necessary to look by analogy to the definition the Court of Military Appeals has subscribed to it in construing other articles in the UCMJ containing the same phrase.[109]

In general, the court has determined that "time of war" refers not only to a war formally declared as such by Congress, but also to an undeclared war whose "existence is to be determined by the realities of the situation as distinguished from legal niceties."[110] The practical considerations examined by the court to determine whether a time of war exists include: 1) "the very nature of the ... conflict [and] the manner in which it is carried on";[111] 2) "the movement to, and the presence of large numbers of American men and women on, the battlefields ... [and] the casualties involved";[112] 3) "the drafting of recruits to maintain the large number of persons in the military service";[113] 4) "the ferocity of the combat";[114] 5) "the extent of the suffering";[115] 6) "the national emergency legislation enacted and ... the executive orders promulgated ... and the tremendous sums being expended for the express purpose of keeping our [troops] in the ... theatre of operations";[116] 7) the authorization of combat pay for officers and enlisted personnel;[117] and finally 8) "the existence *in fact* of substantial armed hostilities."[118] "Of crucial importance" for the court "in all of the cases" is the last consideration,

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[107] MCM, 1984, Part IV, para. 30b(5).

[108] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 103 analysis, app. 21, at A21-5 [hereinafter R.C.M. 103 analysis].

[109] *See* United States v. Bancroft, 11 C.M.R. 3 (C.M.A. 1953); United States v. Gann and Sommer, 11 C.M.R. 12 (C.M.A. 1953); United States v. Ayers, 15 C.M.R. 220; (C.M.A. 1954); United States v. Shell, 23 C.M.R. 110 (C.M.A. 1957); United States v. Anderson, 38 C.M.E. 386 (C.M.A. 1968); United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970). The phrase "time of war" is found in articles 2(a)(10); 43(a),(e), and (f); 71(b); 85; 90; 101; 105; 106; and 113.

[110] United States v. Shell, 23 C.M.R. 110, 114 (C.M.A. 1957).

[111] United States v. Bancroft, 11 C.M.R. 3, 5 (C.M.A. 1953).

[112] *Id.*

[113] *Id.*

[114] United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970).

[115] *Id.*

[116] United States v. Bancroft, 11 C.M.R. 3, 5 (C.M.A. 1953). See also United States v. Ayers, 15 C.M.R. 220, 222-24 (C.M.A. 1954); United States v. Taylor, 15 C.M.R. 232, 237 (C.M.A. 1954).

[117] United States v. Bancroft, 11 C.M.R. 3, 7 (C.M.A. 1953).

[118] United States v. Gann, 11 C.M.R. 12, 13 (C.M.A. 1953).

"the existence of armed hostilities against an organized enemy."[119] Thus, when actual hostilities begin, a time of war begins, "regardless of whether those hostilities have been formally declared to constitute 'war' by action of the Executive [or] Congress";[120] when actual hostilities cease, a time of war ceases.[121]

The 1984 Manual for Courts-Martial defines a time of war as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants [such] a finding."[122] This definition must be read in conjunction with the practical guidance offered by the Court of Military Appeals to resolve the issue. At trial, if it is clear as a matter of law that the offense of spying occurred "in time of war," the judge will resolve the issue as an interlocutory question, and the members will be so advised.[123] If, however, there exists a factual dispute as to whether the offense occurred in time of war, the triers of fact must decide the issue themselves in determining the guilt or innocence of the accused.[124]

In addition to looking at practical considerations, the Court of Military Appeals has held that the meaning of "time of war" in any particular article of the UCMJ "must be determined with an eye to the goal toward which that Article appears to have been directed."[125] In other words, "whether a time of war exists depends on the purpose of the specific article in which the phrase appears."[126] With regard to the spying provision of the UCMJ, the drafters to the 1984 Manual noted that "under the article-by-article analysis used by the Court of Military Appeals to determine whether time of war exists, 'time of war' as used in article 106 may be narrower than in other punitive articles, at least in its application to civilians."[127] The reason for this commentary is found in *United States v. Averette*.[128]

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[119] United States v. Shell, 23 C.M.R. 110, 114 (C.M.A. 1957).

[120] United States v. Gann, 11 C.M.R. 12, 13 (C.M.A. 1953).

[121] United States v. Shell, 23 C.M.R. 110, 114-15 (C.M.A. 1953). *But see* United States v. Ayers, 15 C.M.R. at 225-28 (for statute of limitation purposes of article 43(a), time of war extends beyond the cessation of hostilities and continues until Congress formally proclaims it over for those **purposes);** United States v. Taylor, 15 C.M.R. at 234-36 (for statute of limitation purposes of article 43(f), time of war extends beyond the cease-fire and continues until Congress formally proclaims a termination of hostilities).

[122] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 103(19) [hereinafter R.C.M.].

[123] Dep't of **Army, Pam.** 27-9, Military Judges' Benchbook, para. 3-64 (1 May 1982) [hereinafter Benchbook].

[124] *Id.*

[125] United States v. Ayers, 15 C.M.R. 220, 227 (C.M.A. 1954).

[126] R.C.M. 103 analysis at A21-5.

[127] *Id.* at A21-6.

[128] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

In ***Averette*** the Court of Military Appeals considered the meaning of the phrase "in time of war" as used in article 2(10), UCMJ.[129] Article 2(10) provides that "[i]n time of war, persons serving with or accompanying an armed force in the field" (civilians) are subject to the provisions of the UCMJ.[130] After reviewing the history of military jurisdiction over civilians and the judicial precedent that had construed the term "time of war," the court concluded that for purposes of article 2(10), the phrase translated to "a war formally declared."[131] "A broader construction of Article 2(10)," the court stated, "would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs."[132] In the opinion of the court, guidance from the Supreme Court in the area of military jurisdiction over civilians mandated a "strict and literal construction of the phrase."[133] The court specifically limited its holding to this one proposition: "[F]or a civilian to be triable by court-martial in 'time of war,' Article 2(10) means a war formally declared by Congress."[134]

The decision in ***Averette*** impacts on article 106 because under that article, "any person," to include a civilian, may be guilty of spying "in time of war."[135] What ***Averette*** does, in essence, is restrict the application of article 106 in the case of civilians. Based on the ***Averette*** holding, the military court system would lack the jurisdiction to try a civilian for the offense of spying if the alleged act occurred prior to a formal declaration of war by Congress.[136] Thus, in an undeclared war, such as the Korean or Vietnam war, a civilian accompanying the armed forces in the field would not be subject to trial by court-martial for spying, even if the offense occurred during a time of substantial armed hostilities. On the other hand, applying the Court of Military Appeals definition of "time of war" for all others, a military member would be subject to trial by court-martial for spying in an undeclared war, as long as there existed substantial armed hostilities. In these circumstances civilians, whether allied or enemy, would be afforded different treatment than their military counterparts. The only way to avoid this disparate treatment would be to interpret the "in time of war" phrase in article 106 as strictly referring to a war formally declared by Congress and to apply that interpretation to both civilian and military offenders alike.

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[129] *Id.*
[130] *Id.* at 363-65.
[131] *Id.* at **365.**
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] UCMJ art. 106.
[136] United States v. Averette, 41 C.M.R. **363, 365 (C.M.A. 1970).**

The ambiguity of the phrase "in time of war" in article 106 and the possibility that its definition could vary depending on whether the accused is a civilian or a military member creates an uncertainty in the proof and application of the offense of spying. Another uncertainty is added by the use of the words "any person" in article 106.

The **1984** Manual for Courts-Martial states that the words "any person" "bring within the jurisdiction of general courts-martial and military commissions all persons of whatever nationality or status who commit spying."[137] Despite this unequivocal assertion, the scope of the jurisdiction of article 106 created by the words "any person" is not altogether clear from the few court decisions in the area. The problem stems from the U.S. Supreme Court's ruling in ***Ex parte Milligan.***[138]

In ***Ex parte Milligan*** the Supreme Court considered whether a military commission convened during the Civil War had jurisdiction to try a U.S. civilian accused of communicating with and giving aid and comfort to rebels against the United States in violation of the laws of war.[139] The alleged offenses occurred in a state not involved in the rebellion and were committed by a U.S. citizen who had never been in the military service.[140] The Court held that where violations of the laws of war were committed outside the zone of military operations by a civilian not attached in any way to the military and in a state in which the civil courts were still operating, a trial by military commission was unconstitutional.[141] In conjunction with the holding, the Court did concede that when civil courts are closed during a war, a military commission does have the power to try civilians in "the theater of active military operations, where war really prevails."[142] For purposes of article 106, however, ***Ex parte Milligan*** would appear to deny military commissions the authority to try civilians not accompanying or associated with the armed forces for the offense of spying committed outside the zone of wartime hostilities.[143]

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[137] MCM, 1984, Part IV, para. 30c(3).
[138] *Ex* parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
[139] *Id.* at 6-9.
[140] *Id.* at 7-9.
[141] *Id.* at 121-31.
[142] *Id.* at 127.
[143] *See* DA Pam. 27-161-2, at 61. See also FM 27-10, para. 76 ("It has not been decided whether the phrase "or elsewhere" justifies trial by a military tribunal of *any* person who is not found in one of the places designated or in the field of military operations or territory under martial law and is not a member of the armed forces or otherwise subject to the Uniform Code of Military Justice.").

During World War I the Attorney General of the United States followed the holding *of Ex parte Milligan* in the case of Pable Waberski, a civilian German spy who tried to enter the United States across the Mexican border under the direction of the German ambassador to Mexico.[144] Waberski was apprehended by military authorities when he crossed the border into the U.S., and he was ordered to be tried by court-martial as a spy for violating the 82d Article of War.[145] The Attorney General recited the pertinent facts of the case: Waberski "had not entered any camp, fortification or other military premises of the United States"; he had not "been in Europe during the war, so he had not come through the fighting lines or field of military operations"; he was a civilian unattached to any armed force; and "the regular federal civilian courts were functioning."[146] In view of all of these facts and the decision in *Ex parte Milligan,* the Attorney General concluded:

> [I]n this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside the field of military operations or territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers.[147]

Thus, the Attorney General found that Waberski, a civilian spy unattached to an armed force and operating outside of the zone of military operations, was not subject to the jurisdiction of a court-martial and would have to be tried by the civilian criminal court system.[148]

A year later, the Attorney General overturned this ruling in the face of newly presented facts.[149] The evidence now showed that Waberski had crossed the border from Mexico into the United States three times within twenty-four hours prior to his arrest, and when he was arrested, he was only "about a mile from encampments where were stationed officers and men engaged in protecting the border against threatened invasion from the Mexican side."[150] These facts, "coupled with the further fact that [Waberski] at the time of his arrest was found 'lurking or acting as a spy,"' persuaded the Attorney

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[144] 31 **Op. Att'y** Gen. **356** (1918).
[145] *Id.* at 357-58.
[146] *Id.* at **357.**
[147] *Id.* at 361.
[148] *Id.* at 361-65.
[149] 40 **Op. Att'y** Gen. 561 (1919).
[150] *Id.*

General to reverse his prior decision and to find that a court-martial had jurisdiction to try him as a spy under article 82, despite his status as enemy alien unattached to an armed force. In essence, jurisdiction attached because Waberski was determined to have been within the zone of military operations.

After the second Waberski case, the precedential value of ***Exparte Milligan*** was eroded further in three federal court cases. The first of these cases was ***United States ex rel. Wessek*** v. ***McDonald***.[151] In the ***Wessek*** case the Federal District Court for the Eastern District of New York considered a petition for a writ of habeas corpus from a German citizen who had been arrested in New York City during World War I and who was to be tried by the U.S. Navy at a court-martial for spying in violation of article 5 of the Articles for the Government of the Navy.[152] The sole inquiry in the case was whether the court-martial had jurisdiction over the accused German spy, a man who had masqueraded for two years in New York as a Swiss citizen, but who in fact was a German naval officer.[153] The defense contended that because the United States was outside the zone of war operations and because the civil courts in the United States were functioning, the rule of ***Exparte Milligan*** controlled, and as a result, the court-martial lacked the jurisdiction to try the German.[154] The federal district court disagreed.[155]

Although the district court could easily have distinguished this case from ***Exparte Milligan*** through reference to the accused's membership in the armed forces of the enemy, the court focused instead on the matter of zone of military operations.[156] The district court determined that New York City was within the zone of operations for the war, and that therefore the holding of ***Ex parte Milligan*** was not binding:

> In this great World War through which we have just passed, the field of operations which existed after the United States entered the war, and, especially in regard to naval operations, brought the port of New York within the field of active operations. The implements of warfare and the plan of carrying it on in the last

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[151] "United States *ex rel.* Wessels v. McDonald, 266 F. 754 (E.D.N.Y. 1920), *appeal dismissed*, 256 U.S. 705 (1921).
[152] *Id.* at 756-59.
[153] *Id.* at 758-60.
[154] *Id.* at 760.
[155] *Id.* at 761-64.
[156] *Id.* at 763-64.

> gigantic struggle placed the Untied States fully within the field of active operations. The term "theater of war," as used in the Milligan Case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. . . . It is not necessary that it be said of the accused that he entered forts or armed encampments in the purposes of his mission. . . . It is sufficient if he was here on the mission of a spy and communicated his intelligence or information to the enemy.[157]

Next, in the case of *Ex parte Quirin*, the Supreme Court considered whether a military commission had authority to try seven German citizens and one alleged American citizen who had landed on the east coast of the United States from a German submarine in 1942.[158] Arriving ashore wearing German Marine infantry uniforms or parts of uniforms, all of the accused men had immediately changed to civilian dress and proceeded to various cities in the United States.[159] They had all "received instructions in Germany from an officer in the German High Command to destroy war industries and war facilities in the United States."[160] After their capture, the President appointed a military commission to try the eight accuseds. Charges alleging violations of both the law of war and the Articles of War, to include the offense of spying in article 82, were lodged against them.[161] The defense argued the applicability of the rule of *Exparte Milligan* and contended that the trial should take place in the civil courts of the United States and not in the military courts, so long as the civil courts were "open and functioning normally."[162] The Supreme Court found *Ex **parte** Milligan* distinguishable on the facts.[163]

In the opinion of the Court, Milligan had not been "a part of or associated with the armed forces of the enemy," and he was therefore "a non-belligerent, not subject to the law of war."[164] On the contrary,

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[157] *Id.*

[158] *Ex parte* Quirin, 317 U.S. 1 (1942). The Supreme Court found it unnecessary to resolve the issue whether the alleged American citizen actually retained his American citizenship. See *id.* at 20.

[159] *Id.* at 21.

[160] *Id.*

[161] *Id.* at 22-23.

[162] *Id.* at 24.

[163] *Id.* at 45.

[164] *Id.* at 38.

the Court found that the eight accuseds in ***Ex parte Quirin*** were in fact associated with the armed forces of the enemy and consequently were "enemy belligerents,"[165] subject to trial by a military commission:

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform--an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.[166]

Having decided that a military commission could try an enemy belligerent for a violation of the law of war, the Court expressly declined to consider the constitutionality of a military commission trying an enemy belligerent for spying under the 82d Article of War.[167] The Court did discuss the applicability of its ruling to a U.S. citizen:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the . . . law of war.[168]

Over a decade after the Supreme Court's decision in ***Ex parte Quirin,*** the Court of Appeals for the Tenth Circuit decided a similar

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[165] *Id.*

[166] *Id.* at 45-46. The Supreme Court in ***Ex parte Quirin*** appears to imply that spies are "offenders against the law of war." It has been suggested, however, that the Court "used the term 'offense' in the loose sense in which it is often used in connection with the law of war, i.e., as an act which deprives a person of the privileged status he could claim as a prisoner of war." DA Pam. 27-161-2, at 58 n.72. ***See also*** Baxter, ***So-Called 'Unprivileged Belligerency': Spies*** Guerrillas, ***and Saboteurs,*** 28 Brit. Y.B. Int'l L. 323, 330-31 (1951). But *cf.* Hyde, ***Aspects of the Saboteur Cases,*** 37 Am. J. Int'l L. 88, 88-91 (1943).

[167] ***Ex parte*** Quirin, 317 US. 1, 46 (1942).

[168] *Id.* at 37-38.

case in *Colepaugh* v. *Looney*.[169] The facts in the case revealed that in 1944, Colepaugh, a U.S. citizen wearing civilian clothes, had secretly come ashore on the coast of Maine from a German submarine.[170] He carried "forged credentials and other paraphernalia useful in his assigned mission of espionage" for the German Reich.[171] He was arrested, tried before a military commission for violations of the law of war, spying in violation of the 82d Article of War, and conspiracy, and convicted of all charges.[172] The Tenth Circuit, relying on the holding in *Exparte Quirin*, rejected Colepaugh's argument that the military commission had no jurisdiction to try a U.S. citizen.[173] The court held that because the evidence showed Colepaugh to be an enemy belligerent, his U.S. citizenship did not divest the military commission of jurisdiction over him.[174] Although the Supreme Court in *Exparte Quirin* only approved the jurisdictional reach of the military commission for violations of the law of war, the Tenth Circuit expanded the reach of the military commission by affirming the offense of spying as well as the offenses against the law of war.[175] No explanation was provided by the Tenth Circuit for this expansion, and the Supreme Court denied certiorari in the case.[176]

What *Exparte Quirin* and *Colepaugh v. Looney* leave unresolved is whether an American citizen or an enemy alien, who is living in the U.S. and who is neither associated with the armed forces of the enemy nor within the zone of military operations, is subject to trial before a military commission for the offense of spying under article 106, UCMJ.[177] Assuming that *Ex parte Milligan* remains good law after *Exparte Quirin*, an argument can be made that both such individuals are not amenable to trial by a military tribunal for spying. The tenor of the decision in *Exparte Quirin* would tend to diminish that argument, but the scope of the jurisdiction of article 106 created by the words "any person" remains an unsettled issue.

Apart from the problems with the use of the terms "in time of war" and "any person" in article 106, the remainder of the elements and proof of the offense are generally not controversial and follow the

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[169]Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956), *cert.* denied, 352 U.S. 1014 (1957).
[170]*Id.* at 431-32.
[171]*Id.* at 432.
[172]*Id.* at 431.
[173]*Id.* at 431-33.
[174]*Id* at 432.
[175]*Id.* at 433.
[176]*See* id. at 429-33.
[177]DA Pam. 27-161-2, at 62.

historical model. To be a spy, a person, either a military member or a civilian, must lurk or act "clandestinely or under false pretenses" while "collecting or attempting to collect" information ''with the intent to convey" it to the enemy.[178] The person need not obtain the information or communicate it to be guilty of the offense. "The offense is complete with lurking or acting clandestinely or under false pretenses with intent to accomplish these objects.''[179] Intent to pass information to the enemy "may be inferred from evidence of a deceptive insinuation" of the person among the opposing force.[180] The defense may rebut this inference, however, with evidence that the person had entered enemy lines "for a comparatively innocent purpose," such as "to visit family or to reach friendly lines by assuming a disguise.''[181] Finally, three specific categories of persons are expressly excluded from the definition of spying:

> (a) Members of a military organization not wearing a disguise, dispatch drivers, whether members of a military organization or civilians, and persons in ships or aircraft who carry out their missions openly and who have penetrated enemy lines are not spies because, while they may have resorted to concealment, they have not acted under false pretenses.
> (b) A spy who, after rejoining the armed forces to which the spy belongs, is later captured by the enemy incurs no responsibility for previous acts of espionage.
> (c) A person living in occupied territory who, without lurking, or acting clandestinely or under false pretenses, merely reports what is seen or heard through agents to the enemy may be charged under Article **104** with giving intelligence to or communicating with the enemy, but may not be charged under this article as being a spy.[182]

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[178] UCMJ art. 106; MCM, 1984, Part IV, para. 30b-c. The word "clandestinely" is defined in the Benchbook, para. 3-64, as meaning "in disguise, secretly, covertly, or under concealment." The word "enemy" is defined in MCM, 1984, Part IV, para. 23c as follows: '"Enemy' includes organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. 'Enemy' is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other."

[179] MCM, 1984, Part IV, para. 30c(4).

[180] *Id.* para. 30c(5).

[181] *Id. See* W. Winthrop, supra note 11, at 767 ("This presumption, however, migh—it was ruled—be rebutted by evidence that the party had come within the lines for a comparatively innocent purpose—as to visit his family; or, having been detained within the lines by being separated from his regiment, &c., on a retreat, had changed his dress merely to facilitate a return to the other side. In such a case indeed the clearest proof would properly be required before accepting the defense.'').

[182] MCM, 1984, Part IV, para. 30c(6).

One last definitional problem surfaces in the second category of persons not considered to be a spy, the spy who rejoins his unit but is later captured.[183] As noted earlier, this category existed under the Lieber Code and the Hague Regulations. In fact, the wording used in drawing the category for the 1984 Manual for Courts-Martial is virtually identical to that used in article 31 of the Hague Regulations. By the terms of the category, the exclusion applies only to those who can rejoin an armed force: members of the military. Civilians do not qualify under the exclusion. Thus, a military spy who goes behind enemy lines and returns undetected to his unit cannot be punished as a spy if he is later captured; he must upon capture be accorded the rights of a prisoner of war. The civilian spy, on the other hand, who goes behind enemy lines and returns home undetected, can be punished as a spy if he is later captured; he remains a spy under the law. Two international law commentators have recognized this unfair treatment but provide no rationale for it.[185] The analysis to the 1984 Manual for Courts-Martial neither explains nor mentions the disparity in treatment.[186]

D. UCMJ/MCM SENTENCING PROCEDURE

In article 106 of the UCMJ Congress unequivocally stated that anyone convicted of spying "shall be punished by death."[187] As noted earlier, this is the only offense under the UCMJ that mandates capital punishment solely on the basis of conviction alone.[188] Because of this unique punishment, Congress also mandated in article 51 a unique voting procedure for conviction. Whereas conviction of any other UCMJ offense requires the concurrence of two-thirds of the members, conviction for spying cannot result unless all of the members unanimously agree on guilt.[189] In addition, a court-martial for spying must be a general court-martial, as opposed to any lesser form of court-martial,[190] and the composition of that general court-martial must consist of a military judge and not less than five members.[191] A trial by military judge alone is not an option for an accused in a prosecution for the offense of spying.[192] Furthermore, the trial will

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[183] *See* 2 L. Oppenheim, ***supra*** note 3, at 424-25; 2 H. Wheaton, *supra* note 6, at 220; **DA** Pam. 27-161-2, at 60.
[184] *See* MCM, 1984, Part IV, para. 30 analysis, app. 21, at A21- 92.
[185] 2 L. Oppenheim, *supra* note **3,** at 424-25; 2 H. Wheaton, *supra* note 6, at 220.
[186] MCM, 1984, Part IV, para. 30 analysis, app. 21, at A21-92.
[187] UCMJ art. 106.
[188] *See* R.C.M. 921(c)(2)**(A)** discussion.
[189] UCMJ art. 51(a); R.C.M. 921(c)(2)(A).
[190] UCMJ arts. 18-20; R.C.M. 201(f)(2)(c)(i).
[191] UCMJ arts. 16, 18; R.C.M. 501(a)(1)(A).
[192] UCMJ art. 18; R.C.M. 201(f)(1)(c), 501(a)(1)(A)-(B).

be contested; a guilty plea may not be accepted as to any offense under the UCMJ for which the death penalty may be adjudged.[193]

Even though by law conviction for spying requires a death sentence, the President, by Executive order in promulgating the 1984 Manual for Courts-Martial, requires that sentencing proceedings nevertheless be conducted.[194] These sentencing proceedings mirror those conducted in every other court-martial in which a guilty finding is entered. The trial counsel is first permitted to present evidence in aggravation, and in turn, the defense counsel may present any matter in extenuation and mitigation.[195] The trial counsel may then present rebuttal and the defense surrebuttal.[196] During this sentencing phase, the rules of evidence are generally relaxed for the defense's case.[197] In fact, as a consequence of spying being a capital case, the defense is granted "unlimited opportunity to present mitigating and extenuating evidence" on sentencing.[198] At the conclusion of the presentation of evidence on sentencing, counsel for both sides are permitted to argue for an appropriate sentence.[199]

After argument, unlike any other capital case tried under the UCMJ, the members do not vote on sentence; the military judge is directed by the 1984 Manual simply to announce to the court that by operation of law, a sentence of death is adjudged.[200] Automatically included within this sentence is a dishonorable discharge (or dismissal) from the service.[201] Additionally, confinement is considered a "necessary incident" to the sentence, although technically "not a part of it."[202] An enlisted person in a pay grade above E-1 will be reduced by operation of law to the lowest enlisted pay grade when the convening authority approves the sentence.[203]

Article 52(b)(1) of the UCMJ provides that "[n]o person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial . . . and for an offense . . . expressly made punishable by death."[204] This provision would appear to in-

[193]UCMJ art. 45(b); R.C.M. 910(a)(1).
[194]R.C.M. 1004(d).
[195]R.C.M. 1001(a)-(c); *see also* Gaydos, *A Prosecutorial Guide to Court-Martial Sentencing*, 114 Mil. L. Rev. 1, 12-67 (1986).
[196]R.C.M. 1001(d).
[197]Gaydos, *supra* note 195, at 58; *see* R.C.M. 1001(c)(3).
[198]United States v. Matthews, 16 M.J. 354, 378 (C.M.A. 1983).
[199]R.C.M. 1004(d).
[200]R.C.M. 1004(d).
[201]R.C.M. 1004(e).
[202]*Id.*
[203]UCMJ art. 58(a).
[204]UCMJ art. 52(b)(1).

dicate that Congress intended that the members vote on a sentence after they had convicted an accused of spying. As noted above, however, the sentencing scheme adopted by the President in the 1984 Manual does not allow the members to vote on sentence in such a case.

In a recent opinion, Chief Judge Everett of the Court of Military Appeals mentioned this discrepancy and reasoned that "the President apparently has concluded that, for a mandatory death sentence, no vote by the members on sentence is necessary and that the military judge should simply announce the death sentence."[205] Unfortunately, because this particular issue was not before the court. neither the Chief Judge nor any other member of his court provided any insight into whether the judge-announced sentence for spying violates the congressional mandate for a unanimous members' vote set forth in article 52(b)(1).[206] In view of the fact that the clear language of the statute requires a unanimous members' vote before any accused may be sentenced to death, the Court of Military Appeals, when confronted with the issue, may have no choice but to invalidate the judge-announced sentence scheme as being contrary to law.

Certainly two problems with the judge-announced sentence for a spy are readily apparent. First, it does not allow the imposition of forfeitures. Under the scheme, the military judge announces only that the accused will be put to death. While this sentence, as previously noted, will automatically invoke a dishonorable discharge (or dismissal), confinement until execution, and a reduction to E-1 for an enlisted member, it will not provide for forfeitures from the convicted spy's pay. That means the spy will continue to receive his full pay until the review process is complete and the death sentence ordered executed. If the case were given to the court members to decide a sentence, they could award forfeitures, in addition to the mandatory punishment, and the forfeitures would go into effect as soon as the convening authority approved the sentence.[207] Considering that years may elapse between the initial convening authority's action and final appellate review of the case, the monetary value of these forfeitures would be substantial.

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[205]United States v. Shroeder, 27 M.J. 87, 89 (C.M.A. 1988).

[206]*Id.*

[207]UCMJ art. 57(a); R.C.M. 1113(b); *see* United States v. Matthews, 16 M.J. 354, *382* (C.M.A. 1983).

The second problem with the judge-announced sentence for spying is that in the only two other cases where a mandatory punishment exists under the UCMJ, premeditated murder and felony murder, the members are indeed allowed to vote on sentence.[208] In a non-capital prosecution of either premeditated or felony murder, for example, once the accused has been convicted by the members, the adjudged sentence must by law include confinement for life.[209] Despite the fact that the life sentence is mandatory, the members nevertheless are required to vote on sentence.[210] No apparent reason exists for treating a mandatory death penalty any differently. If the members were allowed to vote on the mandatory death penalty for spying, their vote could serve three purposes. First, the members could exercise their discretion and impose what they believed to be appropriate forfeitures.[211] Second, they would be free to include a recommendation for clemency in their sentence.[212] Finally, they could engage in "jury nullification" and adjudge a sentence less than the mandatory one required by the UCMJ.[213] None of these purposes can be accomplished if the members have no vote on sentence and the military judge simply announces that by law the accused is to be put to death.

No matter who ultimately will be held to be the proper one to announce the death sentence in a spy case, the members or the military judge, the sentencing phase of the court-martial, although ostensibly meaningless in view of the mandatory punishment, serves an important purpose. As noted in the analysis to the 1984 Manual, it allows reviewing authorities "to have the benefit of any additional relevant information."[214] These reviewing authorities play the next crucial role in determining whether the death sentence for spying will be executed.

At the completion of the court-martial for spying, a verbatim written transcript is prepared,[215] and the record of trial is authenticated by the military judge,[216] served on the accused,[217] and forwarded for initial review and action to the officer who convened the general

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[208]R.C.M. 1006(a), (d)(5).
[209]UCMJ art. 118; see *generally* R.C.M. 1004.
[210]R.C.M. 1006(d)(5).
[211]United States v. Shroeder, 27 M.J. 87, 89 (C.M.A. 1989).
[212]*Id.* at 90.
[213]*Id.*
[214]R.C.M. 1004(d) analysis, at A21-68.
[215]UCMJ art. 54(a), (c)(1)(A); R.C.M. 1103(b)(2)(B)(i).
[216]UCMJ art. 54(a); R.C.M. 1104(a)(2)(A).
[217]UCMJ art. 54(d); R.C.M. 1104(b)(1)(A).

court-martial.[218] Prior to taking any action on the death sentence, the convening authority refers the record of trial to his staff judge advocate (SJA) for a recommendation.[219] The SJA reviews the record of trial and makes a specific recommendation to the convening authority as to the action to be taken on the sentence.[220] Before returning the record of trial with his recommendation to the convening authority, the SJA first serves a copy of his recommendation upon the accused's counsel.[221] The counsel for the accused may then make a written submission to the convening authority in rebuttal to the SJAs recommendation.[222] At any time during the period from the announcement of sentence until ten days after the service of the SJA's recommendation, the accused may submit any written matters to the convening authority "which may reasonably tend to affect [his] decision whether to disapprove any findings of guilty or to approve the sentence."[223]

After the convening authority reviews his SJAs recommendation, the record of trial, and any matters submitted by the accused or his counsel, he must take action on the death sentence and he may take action on the findings.[224] What specific action he decides upon is, as Congress noted in the UCMJ, a "matter of command prerogative" and within his own "sole discretion."[225] The convening authority must personally take the action and cannot delegate the function.[226]

Although he is not required to act on the findings of guilty to a charge and specification of spying, the convening authority nonetheless has the unbridled authority to set aside the findings and to dismiss the specification and the charge,[227] and he can do so with or without a reason.[228] Assuming that he takes no action to set aside the findings, however, he must at a minimum explicitly decide in writing whether to approve or to disapprove the mandatory death sentence.[229] Despite the fact that the death sentence is mandatory at the court-martial level, the convening authority may mitigate the punishment at his level by changing it to one of a different nature,

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[218]UCMJ art. 60(a); R.C.M. 1104(e).
[219]UCMJ art. 60(d); R.C.M. 1104(e).
[220]UCMJ art. 60(d); R.C.M. 1106(d).
[221]UCMJ art. 60(a); R.C.M. 1106(f)(1).
[222]UCMJ art. 60(d); R.C.M. 1106(d)(4).
[223]R.C.M. 1105(b); *see* UCMJ art. 60(b).
[224]UCMJ art. 60(c)(2)-(3); R.C.M. 1107(a).
[225]R.C.M. 1107(b)(1).
[226]R.C.M. 1107(a) discussion.
[227]UCMJ art. 60(c)(3)(A); R.C.M. 1107(c)(2)(A).
[228]R.C.M. 1107(c) discussion.
[229]UCMJ art. 60(c)(2); R.C.M. 1107(d)(1), 1107(f)(1).

such as to life imprisonment or to confinement for a term of years, or he may simply disapprove it altogether and substitute no lesser punishment in its place.[230] He needs no reason whatsoever to reduce or to disapprove the death sentence.[231] If his discretion in this area is limited at all, it is by the prescription in the 1984 Manual that he "shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused."[232] Because the statutory language of Congress quoted earlier gives the convening authority "sole discretion" in the area of sentence approval, however, this 1984 Manual language can only be considered as advisory. The sole actual limitation on the convening authority in taking action on sentence is that he may not suspend a sentence to death for any probationary period.[233] In fact, no one, to include the President, may suspend a sentence to death.[234]

If after reviewing the trial record, his SJA's recommendation, and all the matters submitted by the accused and his counsel, the convening authority approves the sentence to death, he sends the entire case forward to his service Judge Advocate General.[235] The convening authority does not have the power to order the death sentence executed; only the President possesses that authority.[236]

The service Judge Advocate General refers the case for review to the Court of Military Review, a court composed of appellate military judges.[237] That court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[238] If the Court of Military Review affirms the findings of guilty for the offense of spying as well as the sentence to death, the case must then be reviewed by the Court of Military Appeals, a court consisting of appellate civilian judges.[239] This court will review the entire record and take action on the findings and sentence "with respect to matters of law."[240] If the court affirms the findings and the sentence, its decision becomes subject to review by

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[230]UCMJ art. 60(c)(2); R.C.M. 1107(d)(1).
[231]UCMJ art. 60(c)(1)-(2); R.C.M. 1107(d)(1)-(2).
[232]R.C.M. 1107(d)(2).
[233]UCMJ art. 71(d); R.C.M. 1108(b).
[234]UCMJ art. 71(a).
[235]UCMJ art. 65; R.C.M. 1111(a)(1).
[236]UCMJ art. 71(a); R.C.M. 1113(c)(3).
[237]UCMJ art. 66(a)-(b); R.C.M. 1201(a)(1).
[238]UCMJ art. 66(c); R.C.M. 1203(b) discussion.
[239]UCMJ art. 67(b)(1); R.C.M. 1203(c)(3).
[240]UCMJ art. 67(d); R.C.M. 1204(a)(1).

the U.S. Supreme Court on writ of certiorari.[241] If the Supreme Court grants a writ of certiorari, that Court has appellate jurisdiction "both as to law and fact."[242] If the Supreme Court either affirms the decision of the Court of Military Appeals or denies the writ of certiorari, the judicial examination of the findings and death sentence for spying is finally complete.[243]

At this point in the review process, the service Judge Advocate General must send the record of trial, the decisions of the Court of Military Review and Court of Military Appeals, and the decision of the Supreme Court, if any, to his service Secretary along with his own recommendation as to the disposition of the case.[244] The service Secretary must then forward the case to the President for final action.[245] The President has absolute discretion to approve the death sentence or to commute or remit it.[246] Only the President may order the execution of a death sentence for spying.[247] If the President approves the death sentence, the case is returned to the service Secretary, who then prescribes the manner in which the execution will be carried out.[248]

In the past, the military services either hanged or shot prisoners sentenced to death.[249] The last military execution occurred in 1961 when an Army enlisted man was hanged at the Disciplinary Barracks, Fort Leavenworth, Kansas, for the rape and attempted murder of an eleven-year-old girl.[250] The Army's current preferred method of execution is by lethal injection.[251]

The death penalty is an authorized, but not a mandatory, punishment for several offenses under the UCMJ other than spying.[252] The

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[241]UCMJ art. 67(h)(1); R.C.M. 1205(a)(1).
[242]U.S. Const. art. 111. § 2, cl. 2.
[243]UCMJ art. 71(c)(1); R.C.M. 1209(a)(1)(c).
[244]R.C.M. 1204(c)(2).
[245]*Id.*
[246]UCMJ art. 71(a).
[247]UCMJ art. 71(a); R.C.M. 1207.
[248]R.C.M. 1113(d)(1)(A).
[249]Army Times, July 4, 1988, at 12, col. 2.
[250]Army Times, July 4, 1988, at 12, col. 2, and at 16, col. 1; English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F.L. Rev. 552, 553 (1979).
[251]Army Reg. 190-55, U.S. Army Correctional System: Procedures for Military Executions, para. 6-1 (27 Oct. 1986).
[252]Capital offenses under the UCMJ include: UCMJ art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender). art. 101 (improper use of countersign), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106(a) (espionage), art. 110 (improper hazarding of vessel), art. 113 (misbehavior of sentinel), art. 118 (murder), and art. 120 (rape and carnal knowledge).

capital punishment procedures established in the 1984 Manual for these offenses, however, are significantly different from those procedures discussed above for spying.[253] First, prior to an accused being arraigned for a capital offense other than spying, if the government wishes to pursue the death penalty the trial counsel must give the defense counsel notice that he intends to prove at least one of the eleven aggravating factors promulgated by the President for use in a capital case.[254] Second, the members vote on the appropriate sentence in all death penalty cases other than spying.[255] In order to adjudge a death sentence for these other capital offenses, the members must initially convict the accused by unanimous vote.[256] Although the UCMJ requires only a two-thirds concurrence of the members to convict the accused of any offense other than spying, the 1984 Manual prohibits the members from even considering the death penalty unless all of the members have unanimously voted to convict the accused during the findings phase of the trial.[257] After convicting the accused and after having heard all of the evidence in the sentencing phase of the trial, the members must then unanimously find beyond a reasonable doubt the existence of at least one aggravating factor[258] and must unanimously concur that any extenuating and mitigating circumstances were "substantially outweighed" by any of the aggravating circumstances and factors of the case.[259]

These procedures ''are designed to ensure that a death penalty is adjudged only after an individualized evaluation of the accused's case, and only after specific aggravating factors are found to have been present.''[260] The 1984 Manual specifically provides that during sentencing, the defense will be given "broad latitude to present evidence in extenuation and mitigation.''[261] In addition, the military judge must instruct the members prior to their voting on sentence to "consider all evidence in extenuation and mitigation before they may adjudge death.''[262] In announcing a sentence of death, the president of the court must announce which aggravating factors were unanimously found by the members during their deliberations.[263] The

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[253] *See generally* R.C.M. 1004.
[254] R.C.M. 1004(b)(1); *see also* R.C.M. 1004(c) for a listing of the aggravating factors.
[255] UCMJ art. 52(b)(1); R.C.M. 1006(a), (d)(4); *see also* R.C.M. 1004(d).
[256] R.C.M. 1004(a)(2).
[257] UCMJ art. 52(a)(2); R.C.M. 1004(a)(2).
[258] R.C.M. 1004(b)(4)(A)-(B), (b)(7), (b)(8)(c).
[259] R.C.M. 1004(b)(4)(c).
[260] Gaydos, *supra* note 195, at 79.
[261] R.C.M. 1004(b)(3).
[262] R.C.M. 1004(b)(6).
[263] R.C.M. 1004(b)(8).

members not only vote on death, but also, unlike the judge-announced mandatory death sentence for spying, they may vote on the type of discharge, reduction, forfeitures, and whatever other punishment they deem appropriate to award as a sentence.[264]

The differences in the sentencing procedures required for the offense of spying and those required for other capital offenses under the UCMJ are important because they reflect a difference in adherence to U.S. Supreme Court precedent in the area of death sentencing. The sentencing procedures for those capital offenses other than spying were adopted to conform as closely as possible with U.S. Supreme Court decisions; the sentencing procedures for spying were not.[265] The analysis to the 1984 Manual cites three reasons for treating the offense of spying differently from the other capital offenses: 1) "Congress recognized that in the case of spying, no separate sentencing determination is required"; 2) "[the Supreme Court] has not held that a mandatory death penalty is unconstitutional for *any* offense"; and 3) "death has consistently been the sole penalty for spying in wartime since 1806."[266] Whether the unique sentencing procedures for spying and its mandatory death sentence are constitutional, in light of these reasons or for any others, requires a thorough examination of death penalty cases.

III. JUDICIAL DEATH PENALTY PRECEDENT

The eighth amendment to the U.S. Constitution prohibits the infliction of "cruel and unusual punishments."[267] Similarly, article 55 of the UCMJ prohibits cruel and unusual punishment and also specifically prohibits punishment by flogging, by branding, marking, or tattooing on the body, and by the use of irons, single or double.[268] Both the U.S. Supreme Court and the Court of Military Appeals, respectively, have interpreted the meaning of these provisions as they apply to the imposition of the death penalty as a punishment. The judicial guidance from these interpretations provide a basic framework for determining when and how the death penalty may constitutionally be imposed. The constitutionality of the mandatory death penalty for spying has never been determined by either the Supreme Court or the Court of Military Appeals. By applying their

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[264] *See generally* R.C.M. 1003, 1006.
[265] R.C.M. 1004 analysis at A21-64.1 to A21-68.
[266] R.C.M. 1004 analysis at A21-68.
[267] U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
[268] UCMJ art. 55.

judicial death penalty precedents to article 106, UCMJ, however, it is possible to judge fairly the constitutionality of the mandatory death penalty for spying. Two basic questions must be answered from the precedents. First, does the offense of spying warrant capital punishment? And, second, assuming the offense of spying does warrant capital punishment, is a mandatory death sentence upon conviction of the offense permissible?

A. *SUPREME COURT PRECEDENT*

In interpreting the cruel and unusual punishment clause of the eighth amendment, the Supreme Court for over half a century has recognized the principle that a punishment should be proportionate to the crime committed.[269] The leading case to state this principle was *Weems v. United States,* decided in 1910.[270] In that case, a Philippine government official was convicted of making two minor false entries in a public document and sentenced to "cadena temporal,"[271] a punishment that "entailed a minimum of 12 years' imprisonment chained day and night at the wrists and ankles, hard and painful labor while so chained, and a number of 'accessories' including lifetime civil disabilities."[272] The Supreme Court held that the punishment was too harsh for the offense committed and thus violated the cruel and unusual punishment prohibition of the eighth amendment.[273] In arriving at its conclusion, the Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[274] The Court also described the cruel and unusual punishment clause as "progressive," "not fastened to the obsolete," and capable of acquiring meaning "as public opinion becomes enlightened by a human justice."[275] This description of the clause was phrased more eloquently in *Trop v. Dulles,* where in a plurality opinion Chief Justice Warren asserted that the eighth amendment drew much of its meaning from "the evolving standards of decency that mark the progress of a maturing society."[276]

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[269] *See* Solem v. Helm, **463** U.S. **277,** 284-88 **(1982); see** *also* Case Comment, *The* ***Requirement*** *of* ***Proportionality in Criminal Sentencing:*** *"Solem* v. ***Helm':*** 11 New England Journal on Criminal and Civil Confinement **238, 239-40 (1985)** (authored **by** Craig Olsen).

[270] Weems v. United States, **217** U.S. **349 (1910).**

[271] *Id.* at **364.**

[272] Solem v. Helm, **463** US. **277, 307** (Burger, C.J., dissenting); ***see*** Weems v. United States, **217** US. at **364.**

[273] Weems v. United States, **217** U.S. at **382.**

[274] *Id.* at **367.**

[275] *Id.* at **378.**

[276] Trop v. Dulles, **356** U.S. 86, **101 (1958).**

In 1972 the Supreme Court considered in *Furman v. Georgia* the question whether the imposition and carrying out of the death penalty in a murder case and two rape cases before it constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[277] In a per curiam decision, the Court held that the imposition of the death penalty in those particular cases did, in fact, violate the cruel and unusual punishment clause.[278] All nine Justices submitted separate opinions, five concurring in the result and four dissenting.[279] Of those Justices in the majority, two believed that the punishment of death for any offense was cruel and unusual, and therefore they concluded that the death penalty was per se unconstitutional.[280] The other three Justices in the majority did not find the death penalty unconstitutional per se; they voted to reverse for reasons primarily focused on the unfettered discretion that the state gave to the jury on sentencing.[281] In the opinions of those Justices, discretionary sentencing in a capital case, absent any state statutory guiding standards, violated the cruel and unusual punishment clause.[282] One of the Justices described discretionary capital sentencing as "pregnant with discrimination."[283] Another claimed such sentencing allowed the death penalty to be imposed "wantonly" and "freakishly."[284] The third Justice argued that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[285] Although the holding in *Furman* is far from clear, the case "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[286]

Following the Supreme Court's decision in *Furman*, many states enacted new death penalty statutes to address the concerns about unfettered sentencing discretion that the Court expressed in that case.[287] These states sought to resolve the discretion problem either

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[277] Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam).
[278] *Id.* at 239-40.
[279] *Id.* at 240.
[280] *Id.* at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring).
[281] *Id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).
[282] *Id.*
[283] *Id.* at 256-57 (Douglas, J., concurring).
[284] *Id.* at 310 (Stewart, J., concurring).
[285] *Id.* at 313 (White, J., concurring).
[286] Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).
[287] *Id.* at 179-80.

by "specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence" or by "making the death penalty mandatory for specified crimes."[288]

In *Gregg v. Georgia* the Court first considered the constitutionality of a statute that specified the factors to be weighed and the procedures to be followed in imposing a death sentence.[289] In *Gregg* the defendant was convicted of murder and then sentenced to death in a bifurcated proceeding by a jury in Georgia.[290] Under the Georgia statutory sentencing scheme in issue, any person convicted of murder received a sentence either to death or life imprisonment.[291] For a death sentence to be adjudged, the jury had to find beyond a reasonable doubt at a separate sentencing hearing that at least one of ten specific statutory aggravating circumstances existed in the case.[292] If a statutory aggravating factor were not found, then a death sentence could not be imposed.[293] Even if such an aggravating factor were found, the jury retained the option to adjudge a life sentence.[294] At the sentencing hearing, the defendant could present to the jury any extenuating or mitigating evidence.[295] Once awarded, the death sentence received an automatic appeal to the state supreme court, where the sentence was reviewed to determine if it was imposed in an arbitrary and capricious manner.[296] In a plurality opinion, the Supreme Court upheld the imposition of the death penalty for murder under this statutory scheme.[297]

Prior to considering the constitutionality of the Georgia sentencing procedure, the plurality of the Court in *Gregg* considered first whether death was per se a cruel and unusual punishment for the crime of murder.[298] To resolve this issue, the plurality constructed a three-part test.[299] First, under contemporary values and standards of decency, was the punishment imposed considered by the American people as an inappropriate and unnecessary sanction for the crime?[300]

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[288] *Id.* at 180.
[289] *Id.* at 196-98.
[290] *Id.* at 158-62.
[291] *Id.* at 162 n.4.
[292] *Id.* at 164-66.
[293] *Id.* at 165-66.
[294] *Id.*
[295] *Id.* at 163-64.
[296] *Id.* at 166-68.
[297] *Id.* at 207.
[298] Gregg v. Georgia, 428 U.S. 153, 168 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).
[299] *Id.* at 173.
[300] *Id.*

Second, did the punishment "involve the unnecessary anti wanton infliction of pain?"[301] And, third, was the punishment "grossly out of proportion to the severity of the crime?"[302] An affirmative response to any of these questions would cause a punishment to violate the cruel and unusual punishment clause. Applying this test to the imposition of death for deliberate murder, the plurality of the Court answered all the questions in the negative. The plurality found first that a "large proportion of American society" continued to regard death as an appropriate punishment for murder.[303] Next, the plurality noted that the death penalty for murder served two possible social purposes, retribution and deterrence of capital crimes by prospective offenders, and therefore, it did not result in the "gratuitous infliction of suffering."[304] Finally, the plurality stated that when life has been deliberately taken by an offender, the imposition of the death penalty was not "invariably disproportionate to the crime."[305] Consequently, the plurality concluded that the death penalty for deliberate murder was constitutionally permissible.[306]

The plurality in *Gregg* next turned its attention to the requirement of *Furman* that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[307] The plurality analyzed the Georgia capital sentencing scheme to determine if it created such a risk. What the plurality found were procedures that were equal to the *Furman* test. The plurality of the Court summarized its findings in this manner:

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While

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[301] *Id.*
[302] *Id.*
[303] *Id.* at 179-82.
[304] *Id.* at 183-87.
[305] *Id.* at 187.
[306] *Id.*
[307] *Id.* at 188.

> the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.[308]

The plurality also noted:

> Moreover, to guard further against a situation comparable to that presented in *Furman,* the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. . . . [T]hese procedures seem to satisfy the concerns of *Furman.*[309]

In *Woodson* v. *North Carolina,* a case decided on the same day as *Gregg,* the Supreme Court considered the constitutionality of the other legislative response to *Furman,* a statute making the death penalty mandatory for specified crimes.[310] The defendants in this case were tried and convicted of first-degree murder in North Carolina.[311] Under the North Carolina law at issue, any person found guilty of first-degree murder was required to receive a mandatory death sentence.[312] In compliance with that law, the defendants were sentenced to death.[313] No discretion on the sentence was allowed.[314] Reviewing this mandatory death penalty statute in light of the decisions in *Furman* and *Gregg,* a plurality of the Court found that it violated the cruel and unusual punishment clause of the Constitution in three areas.[315]

First, relying on an examination of history and traditional usage, jury determinations, and legislative enactments to determine societal values, the plurality determined that the mandatory death penalty statute conflicted with contemporary standards of decency.[316] The plurality surveyed the history of mandatory death penalty statutes

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[308] *Id.* at 206-07.
[309] *Id.* at 198.
[310] Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion).
[311] *Id.* at 282-84 (opinion of Stewart, Powell, and Stevens, JJ.).
[312] *Id.* at 286-87.
[313] *Id.* at 284, 286.
[314] *Id.* at 286.
[315] *Id.* at 288-305.
[316] *Id.* at 288-301.

in America and found that "the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid."[317] Next, the plurality assessed jury determinations and discovered that for two hundred years, American jurors had, "with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."[318] Finally, the plurality examined legislative enactments and ascertained that, prior to the *Furman* decision, every state in the United States, as well as the Federal Government, had rejected automatic death penalty statutes and replaced them with discretionary jury sentencing.[319] The plurality of the Court concluded that "one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense."[320]

The second reason that the plurality provided for overturning the mandatory death sentence statute was "its failure to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentencing."[321] North Carolina had contended that because its mandatory death sentence statute eliminated all the sentencing discretion of the jury in a capital case, it had complied with *Furman's* mandate.[322] After reflecting upon the frequent occurrence of jury nullification in mandatory death sentence cases, however, the plurality rejected this contention.[323] The plurality reasoned that when jurors, deterred by the severity of the sentence automatically imposed, refused to convict an otherwise guilty defendant, they were exercising, in essence, unguided and unchecked discretion regarding who should be sentenced to death.[324] The imposition of the death penalty then rested "on the particular jury's willingness to act lawlessly."[325] The plurality observed that no standards had been provided by the state's mandatory death penalty statute "to guide the jury to its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die."[326] Furthermore, no means had been pro-

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[317] *Id.* at 289-93.
[318] *Id.* at 293, 295-96
[319] *Id.* at 289-95.
[320] *Id.* at 301.
[321] *Id.* at 302.
[322] *Id.*
[323] *Id.* at 302-03.
[324] *Id.*
[325] *Id.* at 303.
[326] *Id.*

vided under the law to enable "the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences."[327] As a consequence, the plurality of the Court found that North Carolina's mandatory death penalty statute did not "fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."[328]

The third and final reason that the plurality gave for rejecting the mandatory death sentence statute was "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[329] The plurality stated its position on this matter with unmistakable clarity: "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[330]

In *Roberts (Stanislaus)* v. *Louisiana,* a case decided by a plurality opinion on the same day as *Gregg* and *Woodson,* the Supreme Court considered the constitutionality of another mandatory death penalty statute, this one promulgated by the State of Louisiana.[331] The defendant in the case had been convicted of first-degree murder committed in the perpetration of a robbery, and he was automatically sentenced under Louisiana law to death.[332] Although Louisiana had adopted "a different and somewhat narrower definition of first-degree murder than North Carolina," the Court found that this difference was "not of controlling constitutional significance."[333] The Court rejected the imposition of the mandatory death sentence under Louisiana law as a violation of the cruel and unusual punishment clause, and in so doing, it reiterated the three reasons it had earlier expressed in *Woodson.*[334]

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[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.* at 304.
[331] Roberts (Stanislaus) v. Louisiana, 428 US. 325 (1976) (plurality opinion).
[332] *Id.* at 327-28.
[333] *Id.* at 332 (opinion of Stewart, Powell, and Stevens, JJ.).
[334] *Id.* at 331-36.

First, the mandatory punishment violated the evolving standards of decency: "The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute."[335] Second, the mandatory sentence "plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate": "[T]here are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences, and there is no meaningful appellate review of the jury's decision."[336] Lastly, the mandatory sentence failed to provide a "meaningful opportunity for consideration of mitigating factors": "The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender—is not resolved by Louisiana's limitation of first-degree murder to various categories of killings."[337]

The Supreme Court reconsidered the constitutionality of the Louisiana mandatory death penalty statute for first-degree murder a year later in *Roberts (Harry) v. Louisiana*.[338] The specific issue in the case was whether a mandatory death sentence could be imposed for the first-degree murder of a police officer engaged in the performance of his lawful duties.[339] Relying on its holding in *Roberts (Stanislaus)*, the Court, in a per curiam opinion, held that the death sentence violated the cruel and unusual punishment clause of the eighth amendment.[340] The Court stated that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense."[341] This concept applied even in the case of a first-degree murder of an on-duty policeman:

> To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and proper-

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[335] *Id.*
[336] *Id.* at 335-36.
[337] *Id.* at 333.
[338] Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) (per curiam)
[339] *Id.* at 636.
[340] *Id.* at 638.
[341] *Id.* at 637.

> ty. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer.[342]

As a result of Louisiana's mandatory death sentence statute failing to allow "for consideration of particularized mitigating factors," the Court found it unconstitutional.[343]

When the Supreme Court in *Gregg* held that the imposition of the death penalty for deliberate murder was constitutional, the plurality of the Court specifically elected not to address "the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life—for example, when capital punishment is imposed for rape, kidnaping, or armed robbery that does not result in the death of any human being."[344] In 1977 the Court, in *Coker v. Georgia,* considered the constitutionality of a death sentence imposed for the rape of an adult woman.[345] Again, the case was decided by a plurality opinion.[346] The plurality of the Court applied a two-part test derived from its previous decision in *Gregg* to determine if the death penalty under such circumstances was cruel and unusual punishment.[347] Under this test, "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[348] Failure of either test renders a punishment unconstitutional.[349] Applying the test to the punishment of death imposed for rape of an adult woman, the plurality of the Court found that the punishment failed the second prong of the test by being grossly disproportionate to the crime.[350]

In making this finding, the plurality looked at historical evidence, legislative enactments, and jury determinations. Of history, the plurality commented that "[a]t no time in the last 50 years has a majority of the States authorized death as a punishment for rape."[351]

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[342] *Id.* at 636-37.
[343] *Id.* at 637.
[344] Gregg v. Georgia, 428 U.S. 153, 187 n.35 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).
[345] Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion).
[346] *Id.* at 586 (opinion of White, J.)
[347] *Id.* at 592.
[348] *Id.*
[349] *Id.*
[350] *Id.*
[351] *Id.* at 593.

Of legislative enactments, the plurality observed that only one state, Georgia, at the time the case was decided, authorized a death sentence for the rape of an adult woman.[352] Of jury determinations, the plurality asserted that "in the vast majority of [rape] cases, at least 9 out of 10, juries have not imposed the death sentence."[353] To these factors, the plurality added its own judgment that death is a disproportionate punishment for the crime of raping an adult woman and thus unconstitutional:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. . . . We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life.[354]

The next major Supreme Court case to consider the death penalty was *Lockett* v. *Ohio,* decided in 1978.[355] At issue in *Lockett* was an Ohio death penalty statute that required the trial judge to impose a death sentence for the offense of aggravated murder under aggravated circumstances unless he found the existence of one of three specified mitigating factors.[356] As interpreted by Ohio's highest court, this statute limited the factors to be considered in mitigation of the defendant's sentence to those three specified.[357] In a plurality opinion, Chief Justice Burger decided that by limiting the range of mitigating factors to be considered by the sentencer, the Ohio statute violated the eighth and fourteenth amendments to the Constitution:[358]

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as *a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[359]

Given that the imposition of death by public authority is so pro-

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[352] *Id.* at 595-96.
[353] *Id.* at 597.
[354] *Id.* at 598.
[355] Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).
[356] *Id.* at 593-94 (opinion of Burger, C.J.).
[357] *Id.* at 608.
[358] *Id.*
[359] *Id.* at 604.

> foundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.[360]

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.[361]

From these statements, the plurality of the Court in ***Lockett*** made it clear that in order to meet the demands of the Constitution, "a death penalty statute must not preclude consideration of relevant mitigating factors."[362]

In 1982, in the case of *Eddings v. Oklahoma*, the Supreme Court further defined the ***Lockett*** rule concerning mitigation evidence in death penalty cases.[363] In *Eddings* a sixteen-year-old defendant was convicted of the first-degree murder of a policeman.[364] At the sentencing hearing the defense presented evidence to show the defendant's troubled and violent family upbringing and his general emotional disturbance.[365] In imposing the death penalty, the trial judge refused, as a matter of law, to consider this mitigation evidence.[366] The Supreme Court held that by placing limits on the mitigation evidence he would consider, the trial judge violated the ***Lockett*** rule: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."[367]

In *Enmund v. Florida* the Supreme Court, much as it did in *Coker*, considered whether the death penalty was a constitutionally valid punishment in a case where the defendant "neither took life, attempted to take life, nor intended to take life."[368] Whereas in ***Coker*** the

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[360] *Id.* at 605.
[361] *Id.*
[362] *Id.* at 608.
[363] Eddings v. Oklahoma, 455 U.S. 104 (1982).
[364] *Id.* at 105-06.
[365] *Id.* at 107.
[366] *Id.* at 109.
[367] *Id.* at 113-14.
[368] Enmund v. Florida, 458 U.S. 782, 787 (1982).

offense in issue was rape, the offense in *Enmund* was felony murder.[369] The facts in *Enmund* showed that the defendant was sentenced to death under Florida's felony murder statute for being the driver of the getaway car in an armed robbery that ended in two murders.[370] The defendant did not kill, attempt to kill, or intend to participate in or facilitate a murder.[371] The Court stated that "the record supported no more than the inference that [the defendant] was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape."[372] In view of these circumstances, the Court held that the imposition of the death penalty was disproportionate to the offense committed and thus violated the cruel and unusual punishment clause.[373]

To support its holding, the Court looked to legislative enactments and jury determinations in the area of felony murder and to its own judgment. The Court found first that only a small percentage of states had laws that allowed the death sentence "to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed."[374] Next, it found "overwhelming" evidence that American juries had "rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder."[375]

In voicing its own judgment, the Court said: "[W]e have the abiding conviction that the death penalty . . . is an excessive penalty for the robber who, as such, does not take human life."[376] The Court was not convinced that either of the two principal social purposes served by the death penalty, retribution and deterrence of capital crimes, would be advanced by imposing the death penalty on someone who did not kill or intend to kill.[377] Relying on its own judgment and those of the legislatures and juries, the Court concluded that the eighth amendment did not permit the imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, at-

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[369] *Id.* at 784-89.
[370] *Id.* at 783-86.
[371] *Id.* at 798.
[372] *Id.* at 788.
[373] *Id.* at 788-801.
[374] *Id.* at 792.
[375] *Id.* at 794-95.
[376] *Id.* at 797.
[377] *Id.* at 798-801.

tempt to kill, or intend that a killing take place or that lethal force will be employed.''[378]

Five years after the *Enmund* decision, the Supreme Court in *Tison v. Arizona* considered once again the imposition of the death penalty in a felony murder case.[379] Before framing the issue in *Tison*, the Court restated the holding of *Enmund* in terms that established the outer boundaries of that decision:

> *Enmund* explicitly dealt with two distinct subsets of all felony murders in assessing whether Enmund's sentence was disproportional under the Eighth Amendment. At one pole was Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state. Only a small minority of States even authorized the death penalty in such circumstances and even within those jurisdictions the death penalty was almost never exacted for such a crime. The Court held that capital punishment was disproportional in these cases. *Enmund* also clearly dealt with the other polar case: the felony murderer who actually killed, attempted to kill, or intended to kill. The Court clearly held that the equally small minority of jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted.[380]

In *Tison* the defendants had been convicted of felony murder and sentenced to death, but their cases did not fall within either distinct subset of felony murder discussed in *Enmund;* their cases fell in between the *Enmund* poles.[381] The facts in *Tison* indicated that the defendants had not evidenced an intent to kill, but that they had been major actors in a felony in which each knew death was likely to occur.[382] The Court defined the issue in the case as "whether the Eighth Amendment prohibits the death penalty in the intermediate case of a defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life.''[383]

To resolve this issue, the Court first examined state felony murder laws and state judicial decisions after *Enmund*.[384] This examination

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[378] *Id.* at 797.
[379] Tison v. Arizona, 481 U.S. 137 (1987).
[380] *Id.* at 149-50.
[381] *Id.* at 151-52.
[382] *Id.*
[383] *Id.* at 152.
[384] *Id.* at 152-55.

revealed that a substantial number of state legislative enactments and state court opinions had authorized the death penalty for the crime of felony murder, even in the absence of an intent to kill, where the defendant's participation in the felony was major and the likelihood of a murder occurring during the felony was high.[385] The Court then determined that "reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death' represented the "highly culpable mental state" necessary to support a capital sentencing judgment.[386] Considering all of these factors, the Court concluded that the cruel and unusual punishment clause did not prohibit the imposition of the death penalty as disproportionate in the case of a felony murder conviction of a defendant whose participation in the felony committed was major and whose mental state was one of reckless indifference to human life.[387]

When the Supreme Court rendered its decision in *Woodson,* invalidating a first-degree murder mandatory death penalty statute, the plurality of the Court, in a footnote, specifically expressed no opinion regarding the constitutionality of ''a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender.''[388] When the Court in ***Roberts*** *(Harry)* invalidated a mandatory death sentence imposed for the first-degree murder of a policeman, the Court, in another footnote, ''reserve[d] again the question whether and in what circumstances mandatory death sentence statutes may be constitutionally applied to prisoners serving life sentences.''[389] One more time, in *Lockett v. Ohio,* the plurality of the Court, in yet another footnote, specifically ''express[ed] no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder.''[390] Finally, in 1987, in the case of *Sumner v. Shuman,* the Court confronted the issue.[391]

The defendant in *Sumner* v. *Shuman* was a prison inmate in

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[385]*Id.* at 154.
[386]*Id.* at 156-58.
[387]*Id.* at 158.
[388]Woodson v. United States, 428 U.S. 280, 287 n.7 (1976)(opinion of Stewart, Powell, and Stevens, JJ.).
[389]Roberts (Harry) v. United States, 431 U.S. 633, 637 n.5 (1977) (per curiam).
[390]Lockett v. Ohio, 438 U.S. 586, 604 n.11 (1978) (opinion of Burger, C.J.).
[391]Sumner v. Shuman, 107 S. Ct. 2716 (1987).

Nevada who had been sentenced to life imprisonment without the possibility of parole for first-degree murder.[392] While serving his sentence, he killed another prisoner and was convicted of capital murder.[393] Under Nevada law, proof of two elements established capital murder: "(1)that [the defendant] had been convicted of murder while in prison and **(2)** that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without the possibility of parole.''[394] Once convicted, the defendant, by operation of law, was automatically sentenced to death; no individualized sentencing procedure was conducted.[395] Conviction "precluded a determination whether any relevant mitigating circumstances justified imposing on him a sentence less than death.''[396] The Supreme Court appraised this mandatory death sentence and found that it violated the cruel and unusual punishment clause of the eighth amendment.[397]

In rejecting the mandatory death sentence, the Court pointed to three factors.[398] First, the Court declared that the mandatory sentencing statute failed to provide the individualized sentencing consideration necessary to a capital case.[399] The Court reasoned that the "two elements of capital murder [did] not provide an adequate basis on which to determine whether a death sentence is the appropriate sanction in any particular case.''[400] Quoting *Gregg*, the Court stated that the principal opinions in that case, ***Woodson,*** and ***Roberts (Stanislaus)*** established that in capital cases, ''it is ***constitutionally*** required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence.''[401] Then, quoting ***Lockett,*** the Court asserted that in death penalty cases, a sentencing authority must be allowed to consider ''***as a mitigating factor,*** any aspect of a defendant's character or record and any of the circumstances of the offense.''[402] In the case of a life-term inmate convicted of murder, the Court identified several possible

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[392] *Id.* **at 2718.**
[393] *Id.*
[394] *Id.* **at 2724.**
[395] *Id.*
[396] *Id.* **at 2718, 2724.**
[397] *Id.* **at 2727.**
[398] *Id.* **at** 2723-27.
[399] *Id.* **at 2723.**
[400] *Id.* **at 2724.**
[401] *Id.* **at 2720 (quoting Gregg** v. **Georgia, 428** U.S. **153, 189 n.38 (1976) (emphasis added)).**
[402] *Id.* **at 2722 (quoting Lockett v. Ohio, 438** U.S. **586, 604 (1978)(emphasis in original)).**

mitigating circumstances that could be considered, such as the nature of the life-term offense, the facts surrounding the murder, the defendant's character, his age, and his moral culpability.[403] Because none of these factors could be presented to the sentencer under Nevada's mandatory sentencing law, the Court felt compelled to invalidate it: "Although a sentencing authority may decide that a sanction less than death is not appropriate in a particular case, the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence."[404]

Second, the Court determined that a mandatory death sentence for a life-term inmate who commits murder was "not necessary as a deterrent" or "justified because of the State's retribution interest."[405] The Court emphasized that both deterrence and retribution are equally well served by a non-mandatory guided-discretion capital statute as they are by a mandatory one: "[A] life-term inmate does not evade the imposition of the death sentence if the sentencing authority reaches the conclusion, after individualized consideration, that the inmate merits execution by the State."[406]

Finally, in a footnote, the Court contended that invalidating the mandatory sentencing statute would eliminate the problem of possible jury nullification:

> If a jury does not believe that a defendant merits the death sentence and it knows that such a sentence will automatically result if it convicts the defendant of the murder charge, the jury may disregard its instructions in determining guilt and render a verdict of acquittal or of guilty of only a lesser included offense. The situation presented by a life-term inmate may present another jury nullification problem if the jury believes that the only manner of punishing a life-term inmate would be execution. In such circumstances undeserved convictions for capital murder could result. Although the jury may believe that the defendant is guilty only of manslaughter, it might still convict of the greater offense because the jurors believe there is no other means of punishment. The guided-discretion statutes that we have upheld, as well as the current Nevada statute, pro-

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[403] *Id.* at 2724-26.
[404] *Id.* at 2727.
[405] *Id.* at 2726.
[406] *Id.* at 2727.

> vide for bifurcated trials in capital cases to avoid nullification problems. Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other.[407]

In conclusion, *Sumner v. Shuman* stands for the proposition that the Supreme Court will insist on individualized sentencing in a capital case.[408] An exception will not be permitted even in the case of a life-term inmate, with no possibility of parole, who has committed murder.[409]

B. COURT OF MILITARY APPEALS PRECEDENT

Although the Court of Military Appeals has never decided the validity of the death penalty procedures under the 1984 Manual for Courts-Martial, in *United States v. Matthews*, a pre-1984 Manual death penalty case, the court held that Supreme Court capital sentencing precedents are applicable to the military justice system unless there is a military necessity for a distinction.[410] The court phrased its position in these terms:

> Since a servicemember is entitled both by [article 55] and under the Eighth Amendment to protection against "cruel and unusual punishments," we shall seek guidance from Supreme Court precedent as to the significance of this protection in capital cases. However, we recognize that, since in many ways the military community is unique, there may be circumstances under which the rules governing capital punishment of servicemembers will differ from those applicable to civilians. This possibility is especially great with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war, e.g. spying.[411]

According to the Court of Military Appeals, then, the sentencing standards established by the Supreme Court for capital cases must be followed in all courts-martial, except those in which a specific

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[407] *Id.* n.13.
[408] *Id.* at 2723-27.
[409] *Id.*
[410] United States v. Matthews, 16 M.J. 354 (C.M.A. 1983).
[411] *Id.* at 368.

military reason, such as combat conditions or war, warrants the applicability of other, perhaps lower, standards.[412] In the normal capital case, the Court of Military Appeals follows Supreme Court guidance and requires that "the sentence must be individualized as to the defendant, and the sentencing authority must detail specific factors that support the imposition of the death penalty in the particular case."[413] As discussed earlier, these requirements have been instituted in the 1984 Manual for Courts-Martial for all capital offenses, except spying.

IV. CURRENT INTERNATIONAL LAW

Prior to applying the judicial precedent to the mandatory death sentence for spying under article 106, it is necessary first to examine the international arena to determine what punishment is appropriate for spying. International law commentators since Bluntschli in the late 1800's have generally agreed that while death usually is an authorized punishment for spying, it certainly is not a mandatory one.[414] In the opinion of Bluntschli, death should be a punishment for spying only "as an extreme measure in the most aggravated case."[415] He believed that in the modern age, spying "is treated more leniently, and a milder punishment, generally imprisonment, is now imposed."[416] Oppenheim's *International Law* expresses the same thought, but in much simpler terms: "The usual punishment for spying is hanging or shooting; though less severe punishments are, of course, admissible, and are sometimes inflicted."[417] *Wheaton's International Law* echoes the identical sentiment: "A person found guilty of espionage may be hanged or shot; but smaller punishments are sometimes imposed."[418] Also, Lauterpacht, writing in the *British Yearbook of International Law,* has called for the "humanization of the law relating to the punishment of spies."[419] And, Stone, in his treatise on *Legal Controls of International Conflict,* writes of the need to mitigate the harshness of the death penalty for spying, and he accepts "Bluntschli's eloquent plea that the death penalty for spies should be limited only to the graver cases."[420]

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[412] *Id.* at 369.
[413] *Id.* at 377.
[414] *See, e.g.*, 2 H. Wheaton. *supra* note 6, at 220; 2 L. Oppenheim, *supra* note 3, at 424.
[415] J. Bluntschli, *supra* note 76, at 78.
[416] *Id.*
[417] 2 L. Oppenheim, *supra* note 3, at 424.
[418] 2 H. Wheaton, *supra* note 6, at 220.
[419] Lauterpacht, *The Problem of the Revision of the Law of War, 28* Brit. Y.B. Int'l L. 360, 381 (1952).
[420] J. Stone, Legal Controls of International Conflict 563 (1954).

Lawrence, in his treatise *The principles of International Law,* best summarizes the modern international view on the punishment for spying by distinguishing, as did Winthrop, between the honorable and the dishonorable spy and the punishment each warranted:

> The customary law on the subject of spies allows commanders to use them, and to evoke the services they render by the promise of rewards. But too often the taint of personal dishonor is held to attach itself to them indiscriminately, whereas in reality they differ from one another as coal from diamonds .... Considerations such as ['disdaining rewards,' 'disregarding danger,' and acting from a 'pure spirit of patriotism'] should serve to mitigate the harsh judgments sometimes pronounced on spies as a class, as if they were all alike. It is impossible to arrive at any reasoned conclusions unless we distinguish ... between those who carry devotion and patriotism to the point of risking their lives in cold blood and without any of the excitement of combat, in order to obtain within the enemy's lines information of the utmost importance to their country's cause, and those who betray the secrets of their own side for the sake of a reward from its foes. The first are heroes, the second are traitors; and it is the height of injustice to visit both with the same condemnation. Military reasons demand that the right to execute spies, if caught, should exist; but unless considerations of safety imperatively demand the infliction of the last penalty, a general should commute it into imprisonment.[421]

In addition to the opinions of commentators, reference to the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* also supports the view that the death penalty is not mandatory for spying.[422] Article 68 of that convention contains the only mention of punishment for spying in any of the four Geneva Conventions or, for that matter, in any modern international agreement.[423] Paragraph 2 of article 68 provides:

> The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the

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[421] T. Lawrence, The Principles of International Law 499-500 (7th ed. 1924).

[422] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. IV].

[423] *Id.* art. 68, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 330.

> military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.[424]

What this paragraph means is that "an occupying power may not sentence a [civilian] to death for espionage, unless such an offense were punishable by death under the law of the occupied territory in force before the occupation began."[425] More importantly, however, the paragraph strongly implies that not only is death not required as a mandatory punishment for spying under international law, but also in certain jurisdictions spying is not even a capital offense. Not surprisingly, this paragraph was unacceptable to the United States, and in ratifying the convention, it made the following reservation to the paragraph: "The United States reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins."[426] Despite the U.S. reservation, the acceptance of the paragraph by the vast majority of signatories to the convention affords the paragraph international law status.[427] Thus, from this treaty provision and the consensus of international law commentators, it appears clear that the death penalty for spying, although generally authorized, should in no sense be considered mandatory.

V. APPLICATION OF SUPREME COURT PRECEDENT

The first question to be answered from Supreme Court precedent is whether the offense of spying warrants capital punishment.[428] To determine if a punishment is disproportionate to an offense committed and hence a violation of the cruel and unusual punishment

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[424] *Id.*

[425] M. Greenspan, The Modern Law of Land Warfare 328 (1959).

[426] Geneva Convention No. IV, 6 U.S.T. 3516, 3660, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 432.

[427] Of the sixty signatories to Geneva Convention No. IV, only six made a reservation to article 68, paragraph 2. These six signatories were Argentina, New Zealand, the Netherlands, Great Britain, Canada, and the United States. ***See*** Geneva Convention No. IV, 6 U.S.T. 3516, 3622-29, 3647-93, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 392-401, 419-64.

[428] *See supra* text accompanying notes 269-76, 298-306, 344-54 & 368-87.

clause, the Supreme Court's method of analysis employed in *Gregg*, *Coker*, *Enmund*, and *Tison* must be applied.[429] First, under contemporary standards of decency, is the punishment of death considered an inappropriate sanction for the crime of spying?[430] The answer to that question is an unequivocal no. International law has authorized the imposition of the death penalty for spying since that law was initially codified,[431] and the U.S. Congress has authorized the death penalty for spying since 1776.[432] Second, does the punishment of death fail to make a measurable contribution to the acceptable goals of punishment?[433] No. Both the goals of deterrence and retribution are applicable to support the death penalty for spying. The death sentence will surely give a potential spy pause to consider his actions prior to volunteering for such a mission, and death is considered an appropriate reward for a spy who betrays his own country. Finally, is the death penalty grossly out of proportion to the severity of the offense?[434] Again, the response is no. Because the end result of spying may be the loss of a battle, an army, or a war, the consequences of the offense certainly warrant an extreme punishment such as death. By finding a negative response to all of these three questions, the Supreme Court would hold that the death sentence for spying is constitutional and not a violation of the cruel and unusual punishment clause of the eighth amendment.

The second question to answer from Supreme Court precedent is whether a mandatory death sentence upon conviction of the offense of spying is permissible.[435] Based on the cases of *Woodson*, *Roberts (Stanislaus)*, *Roberts (Harry)*, *Lockett*, *Eddings*, and *Sumner*, the answer to this question is that the mandatory death sentence is unconstitutional. First, the Supreme Court has determined that mandatory death penalty statutes conflict with contemporary standards of decency.[436] Second, the Court has held that as a consequence of jury nullification in mandatory death cases, juries have exercised unguided and unchecked discretion regarding who should be sentenced to death.[437] Such arbitrary and wanton jury discretion fails the basic *Furman* requirement that there be objective standards to guide the jury in a capital sentencing decision. Third, the Court has

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[429] *See supra* text accompanying notes 298-306, 344-54 & 368- 87.
[430] *See supra* text accompanying notes 269-76, 298-300 & 303.
[431] *See supra* text accompanying notes 63-102 & 414-27.
[432] *See supra* text accompanying notes 18-59.
[433] *See supra* text accompanying notes 298-301, 304, 344-49 & 355.
[434] *See supra* text accompanying notes 298-302, 305, 344-54 & 368-87.
[435] *See supra* text accompanying notes 310-43 & 388-409.
[436] *See supra* text accompanying notes 310-20 & 335.
[437] *See supra* text accompanying notes 321-28, 336 & 407.

rejected mandatory death sentence statutes because they fail to allow the sentencer to consider the relevant aspects of the character and record of the offender and the circumstances of the offense prior to imposing the death penalty.[438] The defense must be given an opportunity to present all relevant mitigating factors to the sentencer, and the sentencer must consider them in deciding on an appropriate punishment.[439] Finally, the Court has held that mandatory death sentences are not necessary as a deterrent or justified because of a retribution interest.[440] The Court reasoned that deterrence and retribution are equally well served by a non-mandatory guided-discretion capital statute as by a mandatory one.[441] The death penalty can be awarded under either type of statute.

Thus, the Court has written in fairly unmistakable language that mandatory death sentence statutes are unconstitutional. And, as long as a judicial proceeding is required to determine guilt before punishment is imposed, no reason of military necessity can save the mandatory death sentence under article 106, UCMJ. To paraphrase the Court in *Sumner* v. *Shuman*, even under a non-mandatory sentencing statute, a spy will not be able to evade the imposition of the death sentence if the sentencing authority reaches the conclusion, after individualized consideration, that he merits execution.

As noted earlier, the analysis to the 1984 Manual for Courts-Martial cites three reasons for treating the offense of spying differently on sentencing from other capital offenses.[442] None of these reasons, however, affect the conclusion that the mandatory death penalty provision is unconstitutional.

The first reason given in the analysis is that Congress recognized that no separate sentencing determination was required for the offense of spying.[443] Yet, despite this congressional recognition, the President, in promulgating the 1984 Manual, rejected it by requiring a separate sentencing hearing for every capital offense, to include spying.[444] Also, as previously discussed, it is not entirely clear that Congress actually intended the absence of a separate sentencing hearing for the offense of spying.[445] By providing in article

[438] *See supra* text accompanying notes 329-30, 337, 341-43, 355- 67 & 399-404
[439] *See* supra text accompanying notes 355-67.
[440] *See* supra text accompanying note 405.
[441] *See* supra text accompanying note 407.
[442] *See* supra text accompanying note 266.
[443] R.C.M. 1004 analysis at A21-68.
[444] *See* R.C.M. 1004.
[445] *See* supra text accompanying notes 204-06.

52(b)(1), UCMJ, that "[n]o person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial," Congress seems to imply that a sentencing proceeding should be conducted even for the offense of spying.[446]

The second reason given in the analysis is that the Supreme Court has not held that a mandatory death penalty is unconstitutional for all offenses.[447] In support of this reason, the analysis references the Supreme Court case of *Roberts (Harry)* and the Supreme Court's reservation in that case of the question whether a mandatory death sentence may be constitutionally imposed for a murder committed by a prisoner serving a life sentence.[448] With the recent opinion of the Court in *Sumner v. Shuman* resolving this issue against the mandatory death penalty, the authority supporting the second reason has vanished.[449] The reasoning of the Court in that case strongly suggests that a mandatory death penalty for any offense is unconstitutional.[450]

The final reason given in the analysis is that the death penalty has been the only penalty for spying in wartime since 1806.[451] This reason is not substantiated by the facts. As noted in the earlier discussion of the historical background of the offense of spying, the spy offense set out from 1862 to 1950 in the Articles for the Government of the Navy of the United States did not mandate a death sentence.[452] Instead, the Navy spy offense gave a court-martial the option to award death or "such other punishment" as it deemed appropriate.[453] In addition, as previously discussed, international law commentators since the late 1800's have agreed that, although the imposition of the death penalty for spying was authorized, less severe punishments were permitted.[454]

None of the reasons cited by the analysis support making an exception to the Supreme Court precedent against mandatory death penalty statutes. And, in view of the reasoning of the Supreme Court in *Sumner v. Shuman*, no military necessity will authorize a mandatory death sentence.

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[446] UCMJ art. 52(b)(1).
[447] R.C.M. 1004 analysis at A21-68.
[448] *Id.*
[449] *See supra* text accompanying notes 391-409.
[450] *See* supra text accompanying notes 398-407
[451] R.C.M. 1004 analysis at A21-68.
[452] *See supra* text accompanying notes 39-46.
[453] *See* supra text accompanying notes 40-42.
[454] *See supru* text accompanying notes 414-21.

VI. CONCLUSION

Shortly after volunteering for his mission of spying on the British, Captain Nathan Hale discussed his decision with a fellow officer and friend, Captain William Hull.[455] In his memoirs, Captain Hull wrote of his final meeting with Captain Hale in terms that express the feeling of the time for the act of spying:

> He asked my candid opinion. I replied that it was an act which involved serious consequences, and the propriety of it was doubtful; and though ***he*** viewed the business of a spy as a duty, yet he could not officially be required to perform it; that such a service was not claimed of the meanest soldier, though many might be willing, for a pecuniary compensation, to engage in it; and as for himself, the employment was not in keeping with his character. His nature was too frank and open for deceit and disguise, and he was incapable of acting a part equally foreign to his feelings and habits. Admitting that he was successful, who would wish success at such a price? Did his country demand the moral degradation of her sons, to advance her interests?
>
> Stratagems are resorted to in war; they are feints and evasions, performed under no disguise; are familiar to commanders; form a part of their plans, and considered in a military view, lawful and advantageous. The fact with which they are executed exacts admiration from the enemy. But who respects the character of a spy, assuming the garb of friendship but to betray? The very death assigned him is expressive of the estimation in which he is held. As soldiers, let us do our duty in the field; contend for our legitimate rights, and not stain our honor by the sacrifice of integrity. And when present events, with all their deep and exciting interests, shall have passed away, may the blush of shame never arise, by the remembrance of an unworthy though successful act, in the performance of which we were deceived by the belief that it was sanctioned by its object. I ended by saying that, should he undertake the enterprise, his short, bright career would close with an ignominious death.[456]

Captain Hull's final words were prophetic for Captain Nathan Hale. He died an ignominious death at the hands of his enemies. Under current military law, Captain Hale would face a similar fate if he were convicted of spying under article 106, UCMJ—mandatory death.

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[455] J. Root, *supra* note **3,** at **74**
[456] *Id.* at 76-76.

In light of recent U.S. Supreme Court decisions rejecting mandatory capital punishment, however, the mandatory death provision in article **106** is certainly unconstitutional. As such, article **106,** UCMJ, should be rewritten to change the phrase "shall be punished by death' to either "shall be punished by death or imprisonment for life as a court-martial may direct" or "shall be punished by death or such other punishment as a court-martial shall direct." The **1984** Manual for Courts-Martial should then be revised to include the offense of spying within the capital sentencing procedures currently in effect for all other capital offenses under the UCMJ. This would require the members to hear all the mitigating evidence offered by the defense at a sentencing hearing, to vote on sentence, and to find the existence of a specified aggravating factor prior to imposing the death sentence.

In the case of Captain Nathan Hale, the members of a court-martial would undoubtedly hear of his good character, and they would see him as a patriotic brother-in-arms, not as a mercenary soldier or a traitor to his country. As a result, the members may vote that life imprisonment is a more appropriate sentence than death. Assuming that Captain Hale's counterpart, Major Andre, is also imprisoned for life, a prisoner exchange could later be arranged by the opposing countries. Captain Hale and Major Andre would then return home as living, honored heroes.

The aforementioned scenario is not so farfetched. A recent, similar situation was described in the ***Congressional Record*** as follows:

> In **1962,** the United States swapped a KGB colonel, Rudolph Abel, for Francis Gary Powers, a U-2 pilot who worked for the CIA. William Donovan, Abel's defense attorney, argued during his trial that Abel should not be sentenced to death because it might be possible to swap Abel for an American later. Donovan told the sentencing judge that "* * * it is possible that in the foreseeable future an American of equivalent rank will be captured by Soviet Russia or an ally; at such time an exchange of prisoners through diplomatic channels could be considered to be in the best interest of the United States." Donovan proved to be right. Because the judge did not sentence Abel to death, the United States was able to trade him for Gary Powers 5 years later.[457]

Thus, in today's world, Captain Hale and Major Andre would live.

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[457] 1 Cong. Rec. S10,349 (daily ed. July 30, 1985).

WEAPON SYSTEMS WARRANTIES: UNLEASHING THE GENIUS IN AMERICAN INDUSTRY?

by Major William R. Medsger*

I. INTRODUCTION

The Department of Defense Authorization Act of 1985[1] requires the Department of Defense to include warranties in all major weapon systems contracts after January 1, 1985.[2] The prime contractor must warrant that the weapon system is free from all workmanship and material defects, that it conforms to the design and manufacturing specifications stated in the contract, and that it meets the essential performance requirements established for the weapon system.[3] If any of these warranties are breached, the contractor is held financially responsible.[4]

This article will first examine the evolution of this statutory warranty requirement. Second, it will discuss the specific requirements that the statute and the implementing regulations impose. Third, the article will examine the intricacies of drafting warranty clauses and will offer practical suggestions for negotiating the terms of these clauses. Finally, this article will provide some observations on the effectiveness of weapon system warranties. This article focuses primarily on the Department of the Army's implementation of the warranty requirements.

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[1]Pub. L. No. 98-525, 98 Stat. 2492 (1984).

[2]Pub. L. No. 98-525, § 1234, 98 Stat. 2492, 2601-03 (1984) (codified at 10 U.S.C. § 2403 (Supp. V 1987)). The statute uses the term guarantee. This article refers to guarantees as warranties because this is the more common legal terminology.

[3]10 U.S.C. § 2403(b)(1)-(3) (Supp. V 1987).

[4]*Id.* § 2403(b)(4).

11. EVOLUTION OF THE WARRANTY REQUIREMENT

A. DOD APPROPRIATIONS ACT OF 1984

The forerunner of the present warranty requirement was included in the Department of Defense Appropriations Act of 1984.[5] That Act proscribed the expenditure of federal funds for the procurement of any weapon system after December 3, 1983, unless the contractor provided written warranties covering the weapon system.[6] The prohibition was not limited solely to the expenditure of funds appropriated by the 1984 Act; it applied also to funds appropriated by any past or future congressional legislation.[7]

The Act required two distinct warranties. First, the contractor had to warrant that the weapon system and its components were designed and manufactured to conform to the government's performance requirements. Second, the contractor had to warrant that the system and its components were free from defects in materials and workmanship that could cause the system to fail to conform to those performance requirements.[8] In the event of a breach of either warranty, the contractor was to promptly correct the deficiency at no cost to the government.[9] If the contractor failed to promptly repair or to replace the defective parts, the government could obtain the repairs from another source and recover those costs from the contractor.[10]

This provision was enacted in response to Congress's continuing awareness that major weapon systems were constantly failing despite the enormous cost necessary to design and produce the weapons. The initiator of the provision, Senator Mark Andrews, stated that the purposes of the warranty provision were "to unleash the genius in American industry, and to make sure that sloppy and faulty designs

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[5]Pub. L. No. 98-212, 97 Stat. 1421 (1983). The Department of Defense Appropriations Act of 1983 was the first attempt by Congress to require warranties. That Act requires that all future purchases of the alternate or new model fighter aircraft engine include warranties that the aircraft engines will perform at not less than 3.000 tactical cycles. Pub. L. No. 97-377, § 797, 96 Stat. 1830, 1865(1982)(reprinted at 10 U.S.C.A. § 2304, note (West Supp. 1989)).

[6]Pub. L. No. 98-212, § 794, 97 Stat. 1421, 1454-55(1983), ***repealed*** **by** Department of Defense Appropriations Act of 1985, § 1234(b)(1), 98 Stat. 2492, 2604 (1984).

[7]Pub. L. No. 98-212, § 794(a), (d), 97 Stat. 1421, 1454-55 (1983).

[8]*Id.* § 794(a)(1), (2), 97 Stat. at 1455.

[9]*Id.* § 794(a)(3)(A), 97 Stat. at 1465.

[10]*Id.* § 794(a)(3)(B), 97 Stat. at 1455.

do not go into production at high costs to the taxpayer and, even worse, jeopardize the lives of our fighting men who rely on these weapons systems."[11] Senator Andrews likened these warranties to those provided routinely in the commercial sector, and he believed that warranties would have the same beneficial effect on weapon systems as they have had on the quality of goods in the commercial sector? Senator Andrews believed that putting responsibility through the use of warranties squarely on American manufacturers would be the best way to stop slipshod quality in United States weaponry.[13]

B. DOD's OPPOSITION TO THE WARRANTY REQUIREMENT

While Congress was debating the warranty legislation, the Department of Defense (DOD) adamantly expressed its aversion to a blanket warranty requirement. DOD was not opposed to the use of warran-

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[11] 129 Cong. Rec. S15668 (daily ed. Nov. 8, 1983). The Senate Committee on Appropriations stated:

> The Committee is concerned that for too long Congress has been preoccupied with appropriating funds to correct defective and shoddy workmanship in weapons systems. Tax dollars should no longer be expended for the purpose of producing military weapons that are operationally unreliable, do not meet the military mission, task, and threat, and may imperil the lives of our troops on the frontlines of our Nation's defense. It is the Committee's belief that Congress must demand that those weapons necessary for a strong defense work as intended.
>
> In order to produce weapons which are reliable and which will enable the protection of vital U.S. security interests, the Committee recommends a general provision in the bill requiring the Department of Defense to obtain written guarantees in production contracts or any other agreements relating to the production of weapons systems . . .

S. Rep. No. 292, 98th Cong., 1st Sess. 12-13 (1983).

Senator Andrews's concern was well founded. In 1983 inoperable weapon systems on Navy ships caused the U.S. Navy to delay its deployment to Lebanon. During the Iran rescue attempt of 1980, the mission had to be aborted because of helicopter malfunctions. The Army's new Bradley Fighting Vehicle initially experienced performance and survivability problems. The M-1 tank has also experienced powerplant, transmission, and accuracy problems. The Sergeant York division air defense weapon system (DIVAD) had experienced major performance deficiencies and was in its waning days when Senator Andrews expressed his concerns. *See infra* note 46.

[12] 129 Cong. Rec. S15688, *supra* note 11. Senator Andrews relied heavily on testimony of the standard industry practice of commercial airlines to demand warranties on their jet engines. *See Department of Defense Appropriations, 1984: Hearings on DOD Appropriations for FY 1984 Before the Subcomm. on the Department of Defense of the Senate Comm. on Appropriations*, 98th Cong., 1st Sess., pt. 4, at 443-53 (1983) [hereinafter *Senate Hearings 19841* (testimony of **Jerry** Smith, Assistant Vice President, USAIR); *id.* at 488-99 (statement of Tom Matteson, consultant representing the airline industry). Senator Andrews's reliance seems misplaced because the risks associated with commercial jets are minimal while those of military aircraft are great. Most commercial jets have been well tested; military aircraft, however, are on the cutting edge of technology.

[13] *Senate Hearings 1984, supra* note 12, at 413.

ties on a selective basis, but only to the blanket application of warranties to all weapon systems contracts.[14] The Deputy Under Secretary of Defense for Acquisition Management, Mary Ann Gilleece, stated that DOD's experience had shown that warranties should be used only on a case-by-case basis and, further, that they should reflect a balance of risk between government and contractor and the attendant cost considerations to both.[15]

Under Secretary Gilleece stated that warranties were only appropriate in the following circumstances. First, the technology of the weapon must be sufficiently mature so that the risks of the warranty can be identified. In this light, it must be remembered that although a warranty may shift the risks to the contractor, at the same time the costs associated with the risks will be shifted to the government. Second, warranties are appropriate only in fixed-price contracts. Third, warranties are appropriate only in a competitive environment. Fourth, warranties should normally cover only selected components and not the entire weapon system. Finally, the government must be able to administer the warranty in a reasonable and inexpensive fashion.[16]

DOD and the defense industry[17] have expressed numerous concerns

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[14] 129 Cong. Rec. S15668, *supra* note 11 (DOD statement on warranties made by Mary Ann Gilleece).

[15] *Id.*; *see also* Gilleece, *The Warranty Tool*, Defense, Feb. 1984, at 25.

Although there was no statutory warranty requirement on all major weapon systems prior to 1984, a 1979 DOD survey revealed that one-third of the items purchased by DOD contained some type of warranty. For a useful, but outdated, discussion of the past use of warranties in DOD contracts, see generally Government Contracts Program, The George Washington University, Monograph No. 2, Government Contract Warranties (1961).

[16] *Senate Hearings 1984, supra* note 12, at 421-22.

[17] *See* letter from Council of Defense and Space Industries Associations to Deputy Undersecretary of Defense for Research and Engineering (Acquisition and Management) (Feb. 21, 1984); *see also* Kozicharo, *Pentagon Asks Change in Weapons Guarantees*, Aviation Week & Space Technology, Apr. 2, 1984, at 14; Flora, *Defense Industry Officials Push Warranty Law Repeal*, Aviation Week & Space Technology, Mar. 5, 1984, at 24; *Senate Hearings* 1984, *supra* note 12, at 501-02 (prepared statement of Electronics Industries Association).

The College of Business, Arizona State University, conducted four forums during 1984-86 to discuss the application of weapon systems Warranties. Representatives from both the defense industry and DOD participated. *See* G. Rider, Warranty Forum (Sep. 13-14, 1984) A Summary Report (Sept. 29, 1984) (unpublished); G. Rider, Warranty Forum II (Jan. 17-18, 1985) Report (Feb 26, 1985) (unpublished); G. Rider, Warranty Forum III (Oct. 10-11, 1985) Report (unpublished).

over the blanket warranty requirement.[18] One concern was that the weapon system's price would include the costs of the warranty, either directly or indirectly, increasing procurement costs to an unacceptable level.[19] Although DOD has made this assertion, it has never presented any cogent evidence demonstrating that the increased costs of warranties are greater than costs incurred because of faulty weapon systems.[20]

Another concern is that warranties would inhibit competition for spare parts.[21] DOD assumed that contractors would often require that spare parts manufactured or approved only by the contractor be used in the repair and maintenance of the system; otherwise, the warranty would be void.[22] This appears to be a valid concern; most contractors desire to maintain some degree of quality control over the weapon system during the warranty period.[23]

The legislation also failed to recognize that the world-wide deploy-

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[18] For an in-depth discussion of each of DOD's concerns, see generally *Department of Defense Appropriations for 1985: Hearings on H.R. 6329 Before the Subcmm. on the Department of Defense of the House of Representatives Comm. on Appropriations*, 98th Cong., 2d Sess., pt. 4, at 688-731 [hereinafter *House Hearings 1985*] (statement of Harvey J. Gonion, Assistant Deputy Under Secretary of Defense for Acquisitions); senate *Hearings 1984*, *supra* note 12, at 421-41 (testimony of Mary Ann Gilleece, Deputy Secretary of Defense for Acquisition Management). It should be noted, however, that after the enactment of section 794, Secretary of the Navy John Lehman recommended that DOD drop its opposition to the warranty law and, instead, embrace it with the wider application of warranties. 41 Fed. Cont. Rep. (BNA) 525 (Mar 26, 1984).

[19] *E.g.*, letter from Deputy Secretary of Defense Paul Thayer to Senator John Tower (Oct. 28, 1983), *reprinted in* 129 Cong. Rec. S15666 (daily ed. Nov. 8, 1983).

[20] For a brief discussion of DOD's inability to determine the true cost effectiveness of warranties, see *infra* text at sec. IX.F.

[21] Thayer letter, *supra* note 19.

DOD has a program to encourage the procurement of spare parts from other than the prime contractor. The objective of the DOD Spare Parts Breakout Program is to reduce costs by "breaking out" parts for purchase from other than the prime weapon system contractors while still maintaining the integrity of the systems and equipment in which the parts are used. Dep't of Defense Federal Acquisition Reg. Supp. No. 6 (Nov. 25, 1988); Dep't of Defense Directive 4140.57, DOD Replenishment Parts Purchase or Borrow Program (Apr. 13, 1987).

[22] This is referred to as a "tying arrangement." For a discussion of the anti-competitive effects of such arrangements and their implications as violations of the Sherman Antitrust Act (15 U.S.C. § 1(1982)), see, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 1 (1984); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa.), *aff'd*, 365 U.S. 567 (1960). *See* generally Ross, *The Single Product Issue in Antitrust Tying: A Functional Approach*, 23 Emory L.J. 963 (1974); Pearson, *Tying Arrangements and Antitrust Policy*, 60 Nw. U.L. Rev. 626 (1965); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50 (1958); Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957).

[23] For further discussion of the implications of these restrictions, see *infra* text at sec. IV.F.

ment and support of weapon systems would frequently nullify any reasonable warranty.[24] Deployment of weapon systems on ships or in combat would sometimes deny contractors the opportunity to correct defects promptly, because the systems would be inaccessible to the contractors. Even if the systems are accessible, the repair and test facilities at the deployed locations would frequently be woefully inadequate.[25]

The legislation ignored the reality that some weapons cannot be recovered for repairs. Because the only remedy stated in the legislation was the repair of a weapon system at no cost to the government,[26] the remedy would be useless in cases where the defect was not discovered until the weapon had been expended.[27] Expended missiles are a primary example of weapons that are not normally recoverable for repairs. Thus, an alternate remedy, allowing the government to make a downward economic adjustment to the contract price, should be available.[28]

DOD was also concerned because the excessive use of warranties creates the onerous and expensive problem of administrating and litigating warranty claims.[29] Although this burden may result from enforcing warranties, the benefits derived from the warranties should outweigh these administrative burdens. Also, it is always within the government's power to mitigate these problems by streamlining the procedures for asserting and settling warranty claims.[30]

Another problem is that technology is not always useful in identifying the cause of a defect and determining who is responsible for the defect.[31] Because the government must prove by a preponderance

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[24]Thayer letter, *supra* note 19. Senator Andrews also recognized this situation. *See Department of Defense Appropriations, 1985: Hearings on H.R. 6329/S. 3026 Before the Subcomm. on the Department of Defense of the Senate Comm. on Appropriations*, 98th Cong., 2d Sess., pt. 1, at 129 (1984) [hereinafter *Senate Hearings 1985*].

[25]The current legislation does not require the government to give the contractor an opportunity to correct the defect. Rather, in these situations the government may secure the correction from another source and still recoup the reasonable costs from the contractor. 10 U.S.C. § 2403(b)(4) (Supp. V 1987).

[26]Pub. L. No. 98-212, § 794(a)(3), 97 Stat. 1421, 1455 (1983).

[27]*E.g.*, letter from Deputy Under Secretary of Defense for Acquisition Management Mary Ann Gilleece to Senator Pete Wilson (July 25, 1983), reprinted in 129 Cong. Rec. S15666 (daily ed. Nov. 8, 1983).

[28]DOD's current regulations provide this remedy. *See* Dep't of Defense Federal Acquisition Reg. Supp. 246.770-2(a)(2)(iii) (1988) [hereinafter DFARS].

[29]*E.g.*, Gilleece letter, *supra* note 27.

[30]In response to mandated warranties, W D has streamlined its warranty administration procedures. *See generally* Army Reg. 700-139, Army Warranty Program Concepts and Policies (Mar. 10, 1986) [hereinafter AR 700-1391.

[31]Gilleece letter, *supra* note 27.

of evidence that the probable cause of the defect was attributable to the contractor,[32] the government would sometimes be unable to enforce the warranty. Proof of mere failure of an item during the warranty period does not create a presumption of the existence of a defect covered by the warranty.[33] Moreover, if the weapon was expended, destroyed, or abandoned during combat, proving the existence of a defect, much less its probable cause, would often be impossible.

Warranties also complicate contract negotiations and add to procurement lead times.[34] Even though this is true, however, the basic premise of the warranty requirement is that the benefits derived from warranties outweigh these inconveniences.

DOD also noted that no funds were provided in the fiscal year 1984 budget to cover the increased acquisition costs associated with warranties.[35] Although this concern was valid in 1984, and still may be valid in some ongoing procurements, future budgets will include the costs of all warranties.[36]

Another problem was that it seems illogical to require warranties in cost-type contracts. The government chose to bear these risks when it selected the contract type,[37] and the contractor's costs associated with the warranties will be passed on to the government.

The defense industry's paramount fear and concern was that requiring a contractor to guarantee that the weapon system will meet

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[32] *See, e.g.*, Aero Prod. Research, Inc., ASBCA No. **25956, 87-1** BCA ¶ **19,425,** at **98,213;** A.L.S. Elecs. Corp., ASBCA No. **23128, 82-2** BCA ¶ **15,835,** at **78,477;** Great Valley Constr. Co., ASBCA No. **24449, 81-2** BCA ¶ **15,308,** at **75,801;** George E. Jenson Contractor, Inc., ASBCA No. **23284, 81-2** BCA ¶ **15,207,** at **75,296,** *mot. for reconsideration denied*, ASBCA No. **23284** (Sep. **21, 1981);** Abney Constr. Co., ASBCA No. **23686, 80-2** BCA ¶ **14,506,** at **71,514;** Julian A. McDermott Corp., ASBCA No. **23435, 80-1** BCA ¶ **14,210,** at **69,943;** Vi-Mil, Inc., ASBCA No. **16820, 75-2** BCA ¶ **11,435,** at **54,482;** Bromfield, ASBCA No. **16968, 73-2** BCA ¶ **10,357,** at **48,908;** Rentel & Frost, Inc., ASBCA No. **8966, 1963** BCA ¶ **3880,** at **19,270.** These cases involved warranty claims under government contracts other than weapon systems contracts.

[33] Ed Dickson Contracting Co., ASBCA No. **27205,** 84-1 BCA ¶ **16,950,** at **84,311;** Triangle Fainting Co., ASBCA No. **23643, 80-1** BCA ¶ **14,434,** at **71,162;** S & E Contractors Inc., ASBCA No. **11044, 67-1** BCA ¶ **6175,** at **28,611.**

[34] *E.g.*, **41** Fed. Cont. Rep. (BNA) **249** (Feb. **13, 1984)** (remarks of Mary Ann Gilleece during meeting with the Senate Budget Committee staff on Jan. **30, 1984).**

[35] *Id.*

[36] Service regulations now require that the costs of procuring and administering warranties be included in FY budgets. *E.g.*, AR **700-139,** paras. 2-6c, **2-7f.**

[37] Fed. Cont. Rep., *supra* note **34;** see *also* Federal Acquisition Reg. 46.705(a) (Apr. **1, 1984)** [hereinafter FAR] and *infra* text at II. D., which discusses this rationale.

the essential performance requirements of the system was neither prudent nor practicable. The contractors were uncomfortable because they did not design the system; they merely followed a government-provided specification. A warranty in this instance would place too much risk on the contractor.[38] To refute this concern and to justify the utility of a performance warranty, however, even when the government controls the design, Senator Andrews used the procurement of the C-5 aircraft as an example. In that procurement, the Air Force decided to reduce the weight of the C-5 by reducing the weight of the wing spar. This engineering change decreased the wing's strength and caused the aircraft to fail. Senator Andrews speculated that if the C-5 had been covered by a performance warranty, the manufacturer, Lockheed, would have researched the effect of this change, objected to the change, and maybe even refused to make the design change. Without a warranty there was little incentive for Lockheed to investigate beforehand the ramifications of this change. Consequently, the government incurred $1.4 billion in costs to rectify the design mistake.[39]

DOD also argued that requiring the contractor to bear the risks of the design would have inimical effects on second sourcing,[40] competition, breakout of parts,[41] and small business awards.[42]

DOD officials professed that quality is best assured by extensive test and evaluation programs prior to production and by quality assurance programs during production, instead of by the use of warranties.[43] Senator Andrews countered by pointing out that recent procurement history is replete with examples of inadequate testing.[44]

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[38] *E.g.*, 41 Fed. Cont. Rep. (BNA) 525 (Mar. 26, 1984). The present statutory requirement has somewhat alleviated this concern because warranties now are required only for items in mature full-scale production. 10 U.S.C. § 2403(f) (Supp. V 1987); *see also infra* notes 99-101 and accompanying text.

The normal practice had been to use a specification warranty (conforms to the design) when the government provided the design. If the contractor designed the system, a performance warranty was used instead. *See* Defense Acquisition Reg. 1.324.2(b)(1) (ASPR, 1976 ed., Aug. 1, 1978).

[39] *Senate Hearings 1984*, *supra* note 12, at 432.

[40] Second sourcing is an objective of DOD that attempts to obtain more than one source for the production of a weapon system. This enhances competition and diminishes many of the problems of relying on a sole source, such as labor strike disruptions and the inability to sufficiently increase production during industrial mobilization.

[41] For a discussion of breakout of parts, see *supra* note 21.

[42] *House Hearings 1985*, *supra* note 18, at 706-07 (testimony of H. Gordon).

[43] *Senate Hearings 1984*, *supra* note 12, at 435 (testimony of Seymour J. Lorber, Director of Product Assurance and Testing, U.S. Army Materiel Development and Readiness Command (now U.S. Army Materiel Command).

[44] *Id.* at 418 (statement of Senator Andrews).

For example, the Navy purchased eight CG-47 Aegis cruisers at $1 billion each before sea trials were conducted and before it was shown that the ship was capable of meeting Navy mission requirements.[45] Additionally, the Army's Patriot air defense missile system and the Air Force's Phoenix air-to-air missile are both being built without complete testing because existing aerial targets cannot adequately test the systems' capabilities.[46]

C. DOD IMPLEMENTS THE WARRANTY REQUIREMENT

Despite DOD's objections, Congress enacted the warranty requirement. The final version, however, modified the initial proposal. It granted the Secretary of Defense authority to waive the warranty requirement whenever he determined that a waiver was necessary in the interests of national security or when the warranty would not be cost effective.[47]

On December 14, 1983, DOD granted its first waiver. Deputy Defense Secretary Paul Thayer issued a ninety-day waiver of the warranty requirement for all weapon systems contracts.[48] Deputy Secretary Thayer justified the waiver on the basis that it was in the interests of national security to prevent delays to or disruptions of the acquisition process while DOD was drafting guidelines to implement the statutory warranty requirement.[49]

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[45] *Id.*

[46] *Id.* Another example of inadequate testing, which is familiar to Army personnel, is the Sergeant York division air defense system (DIVAD) acquisition. The entire DIVAD program was eventually terminated in 1985 for failure to meet performance requirements. For further examples of inadequate testing, see generally General Accounting Office, NSIAD-85-68, *Production of Some Major Weapon Systems Began with only Limited Operational Test and Evaluation Results* (June 19, 1985). It should be noted that Congress may have alleviated this problem somewhat by enacting legislation in 1986 mandating that a major defense acquisition program may not proceed beyond low-rate initial production until initial operational test and evaluation is completed. Continuing Appropriations Act, Fiscal Year 1987, Pub. L. No. 99-591, § 910, 100 Stat. 3341, 3341 (1986) (codified at 10 U.S.C. § 2366a(1)(c) (Supp. V 1987)). Operational test and evaluation means the field test, under realistic combat conditions, of any item of (or key component of) weapons, equipment, or munitions for the purpose of determining the effectiveness and suitability of the weapons, equipment, munitions for use in combat by typical military users and the evaluation of the results of such tests. 10 U.S.C. § 138(a)(2)(A)(i) & (ii) (Supp. V 1987).

[47] Pub. L. No. 98-212, § 794(c), 97 Stat. 1421, 1454 (1983).

[48] Memorandum from Paul Thayer to the Secretaries of the Military Departments (Dec. 14, 1983), *reprinted in* 40 Fed. Cont. Rep. (BNA) 955 (Dec. 19, 1983).

[49] *Id.*; *see also Department of Defense Appropriations, 1985: Hearings on H.R. 6329 Before the Subcmm. on the Department of Defense of the House of Representatives Comm. on Appropriations,* 98th Cong., 2d Sess., pt. 1, at 625 (1984) (statement of Defense Secretary Casper Weinberger).

In January 1984 DOD's proposed guidance was published in the Federal Register.[50] The guidance attempted to define such terms as "weapon system" and ''performancerequirements" satisfactorily;[51] the legislation itself had failed to define these terms. Additionally, the guidance listed several factors to consider when determining if a waiver based on cost effectiveness should be granted.[52] The final guidance was issued on March 14, 1984.[53]

D. DOD WAIVES APPLICABILITY TO COST CONTRACTS

On that same day, DOD waived the application of the warranty requirement to all cost-type contract~When notifying Congress of this waiver, Deputy Secretary of Defense William H. Taft IV stated that DOD'sinterpretation of the warranty legislation did not require the inclusion of warranties in cost-type contracts. He reasoned that in cost contracts the contractor's obligation to perform is based on DOD's willingness to reimburse the contractor for all costs incurred. He further stated that the interdependence of these obligations resulted in requirements that were conditional rather than absolute, and that the warranty provision did not apply to conditional contract~He did not expound upon the basis for this conclusion.[56]

To avoid any legal dispute, however, as to the applicability of warranties to cost contracts, Deputy Secretary Taft waived the warranty requirement in cost contracts on the basis that such warranties are not cost effective. He stated that it would be cost effective for DOD to pay only the actual costs incurred by the contractor rather than agreeing to a price that by necessity includes contingencies to

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[50]49 Fed. Reg. 2502 (1984) (proposed Jan. 17, 1984).

[51]*See id.*

[52]Factors to consider include: the government's costs to administer and enforce the warranty; the contractor's experience in producing the item; the government'scosts to repair or replace the defective item in the absence of a warranty; and other indirect costs, such as the effect on competition if spare parts must be purchased only from designated suppliers to keep the warranty in effect. *Id.*

[53]Memorandum from Deputy Secretary of Defense William H. Taft IV for the Secretaries of the Military Departments (Mar. 14, 1984), *reprinted in Senate Hearings 1985, supra* note 24, pt. 2, at 12, and in 41 Fed. Cont. Rep. (BNA) 507 (Mar. 19, 1984). The final guidance did not differ significantly from the proposed guidance.

[54]*Id.*

[55]Letter from William H. Taft IV to Senator John G. Tower (Mar. 14, 1984), *reprinted in Senate Hearings 1985, supra* note 24, pt. 2, at 18, *and in* 41 Fed. Cont. Rep. (BNA) 506 (Mar. 19, 1984).

[56]Although not clear, the rationale appears to be that in a cost contract the government would reimburse the contractor for all incurred costs, including the costs incurred in providing and administering the warranty.

cover unforeseen warranty risks. By paying only actual costs, DOD would avoid paying for contingencies that never would occur.[57]

The better rationale is that most cost contracts involve the research and development or initial production of weapon systems, and therefore that they involve great uncertainties as to whether the systems will perform as expected. Accordingly, these contingency costs would be too high. Furthermore, if fixed-price warranties are included in cost contracts, contractors would have an incentive to incur excessive reimbursable expenses prior to delivery rather than to incur post-delivery warranty costs that are not reimbursable.[58]

E. CONGRESS AMENDS THE WARRANTY REQUIREMENT

Although the atmosphere in Congress was not favorable to a complete and immediate repeal of the provision, many congressmen expressed dissatisfaction with the warranty provision and expressed an amenability to its revision. For political reasons, however, they believed that any change should be initiated by DOD and not by the Congress.[59]

DOD responded by proposing alternate language for the provision.[60]

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[57] Taft letter, *supra* note 55. This same rationale would dictate that warranties are not cost effective in fixed-price contracts also. In fixed-price contracts, the contractor will also include a contingency factor in the price of the warranty. In 1985 DOD reversed its policy, and it now requires warranties in cost-type contracts. *See infra* note 107 and accompanying text.

[58] Taft letter, *supra* note 55. Although recognizing the appropriateness of waiving the applicability of warranties in many cost contracts, the General Accounting Office questioned the propriety of a class waiver for all such contracts. Comp. Gen. Dec. B-214690, Apr. 24, 1984 (reply to Senator Ted Stevens's questions regarding DOD guidance implementing the weapon systems warranty legislation).

[59] 41 Fed. Cont. Rep. (BNA) 453 (Oct. 1, 1984), 41 Fed. Cont. Rep. (BNA) 524 (Mar. 26, 1984). *But cf.* S. 2723, 98th Cong., 2d Sess., § 191(a)(1) (1984) (The Senate attempted to expand the warranty requirement to cover not only weapon systems, but also other major defense equipment used to carry out combat operations. The final version, however, did not include "other defense equipment.").

[60] The proposed language was:

> Sec. XXX. (a) The Secretary of Defense shall issue regulations requiring that, when cost effective, warranties shall be included in contracts for the production of weapon systems.
>
> (b) A written warranty provided pursuant to subsection (a) shall not apply in the case of any weapon system or component thereof which has been furnished by the Government to the Contractor.
>
> (c) The Secretary of Defense may provide for a waiver of the requirement for a warranty where—
>
> (1) the waiver is necessary in the interest of the national defense; and
>
> (2) the Committee on Armed Services and Appropriations of the Senate and House of Representatives are notified in writing of his intention to waive such

Basically, DOD's proposed language merely required the Secretary of Defense to use warranties in weapon system contracts whenever warranties would be cost effective. Additionally, it provided that waivers could be granted in the interests of national security.

Congress found the proposal to be too hollow, citing the proposal's failure even to state what warranties were required.[61] Instead of using DOD's proposed language, Congress, relying heavily on DOD's guidelines implementing the statutory warranty requirement, rescinded section 794[62] and included a revised weapon system warranty provision in the DOD Authorization Act of 1985.[63]

III. CURRENT WARRANTY REQUIREMENT

The revised provision requires that all weapon systems production contracts entered into after January 1, 1985, include a warranty by the prime contractor that: 1) the item provided under the contract will conform to the design and manufacturing requirements specifically delineated in the production contract (or any amendment to that contract); 2) at the time the item is delivered, it will be free from all defects in materials and workmanship; and 3) the item will conform to the essential performance requirements as specifically delineated in the production contract (or any amendment to that contract).[64]

The statute allows the Secretary of Defense to waive all or part of the warranty requirements if he determines that the waiver is necessary in the interest of national defense or if he determines that

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requirements. The notification shall include an explanation of the reasons for the waiver.

(d) The requirements for written wananties provided pursuant to subsection (a) hereof shall not cover combat damage.

The above passage was reprinted in ***Senate*** *Hearings* 1985, *supra* note 24, pt. 2, at 54, and in 41 Fed. Cont. Rep. (BNA) 752 (Apr. 30, 1984). This proposed provision was included in a DOD supplemental appropriations request for FY 85. DOD placed the provision in its military construction request instead **of** in its general defense request. Military construction requests are considered by the Senate military construction subcommittee while general defense requests are considered by the Senate defense subcommittee, of which Senator Mark Andrews was a member. It was alleged that DOD intentionally avoided the defense subcommittee because DOD believed that it would receive more favorable treatment from the military construction subcommittee. ***See*** *generally Defense's Sneak* ***Attack*** *on a Warranty* ***Law,*** Bus. Wk., Feb. 20, 1984, at 30.

[61] 41 Fed. Cont. Rep. (BNA) 751 (Apr. 30, 1984).

[62] Pub. L. No. 98-212, § 794, 97 Stat. 1421, 1454-55 (1983), repealed *by* Department of Defense Appropriations Act of 1985, § 1234(b)(1), 98 Stat. 2492, 2604 (1984).

[63] Pub. L. No. 98-525, § 1234, 98 Stat. 2492, 2601-03 (1984) (codified at 10 U.S.C. § 2403 (Supp. V 1987)).

[64] 10 U.S.C. § 2403(b) (Supp. V 1987).

the warranty would not be cost effective.[65] Within the Department of the Army, this authority has been delegated to the Deputy Assistant Secretary of the Army for Procurement.[66]

Before a waiver may be granted for a major defense acquisition program, DOD must notify Congress of the intention to grant the waiver.[67] A major defense acquisition is any program that is: 1) designated as such by the Secretary of Defense; or 2) estimated to require a) an eventual total expenditure for research, development, testing, and evaluation of more than $200 million (based on fiscal year 1980 constant dollars), or b) an eventual total expenditure for procurement of more than $1 billion (based on fiscal year 1980 constant dollars).[68] Furthermore, the definition excludes highly sensitive classified procurements.[69] For non-major defense acquisitions, DOD must submit an annual report to Congress identifying all waivers granted during the preceding year.[70]

Unlike the previous provision, only prime contractors[71] must give these warranties.[72] This has alleviated to some extent the concern that small business subcontractors would be financially unable to provide the required warranties.[73] Nonetheless, in reality, prime contractors will most likely require subcontractors to warrant the items in their subcontracts either directly or through indemnification provisions. Thus, the true impact on small businesses is uncertain.

The new legislation provides more extensive guidance because it defines many of the key terms that were not defined in the earlier legislation. "Weapon systems" is defined as items that the armed forces can use directly to carry out combat missions, but it does not include commercial items sold in substantial quantities to the general

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[65] *Id.* § 2403(d).

[66] Army Federal Acquisition Reg. Supp. 46.770-9(d) (Apr. 1, 1988) [hereinafter AFARS]. The contracting officer must submit a request for waiver at least 45 days prior to the anticipated award date. Id.

[67] 10 U.S.C. § 2403(e)(1) (Supp. V 1987). The notice must ordinarily be given 30 days prior to granting the waiver. DFARS 246-700-9(a). See DFARS 246.770-9(d) for procedures for submitting waivers

[68] 10 U.S.C. § 2430 (Supp. V 1987).

[69] *Id.*

[70] 10 U.S.C. § 2403(e)(2) (Supp. V 1987). See also DFARS 246.700-9(b), (d).

[71] A prime contractor is a party entering into an agreement directly with the United States. 10 U.S.C. § 2403(a)(2) (Supp. V 1987).

[72] *Id.* § 2403(b). Army policy dictates that pass-through warranties, which require the government to seek remedies directly from the subcontractors, not from the prime contractor, will not be used except for traditional pass-through warranties, such as for tires and batteries. AR 700-139, para. 4-8(e).

[73] *See supra* note 42.

public.[74] The Department of Defense Federal Acquisition Regulation Supplement (DFARS) gives the following examples of items within this definition:

> tracked and wheeled combat vehicles; self-propelled, towed and fixed guns, howitzers and mortars; helicopters; naval vessels; bomber, fighter, reconnaissance and electronic warfare aircraft; strategic and tactical missiles including launching systems; guided munitions; military surveillance, command, control, and communication systems; military cargo vehicles and aircraft; mines; torpedoes; fire control systems; propulsion systems; electronic warfare systems; and safety and survival systems.[75]

The DFARS further states that the term does not include related support equipment, such as ground-handling equipment, training devices and their accessories, or ammunition, unless an effective warranty for the weapon system would require inclusion of such items.[76] The warhead on a missile is an example of ammunition that should be included because the warhead is an integral part of a missile weapons system. A bullet for a rifle, however, does not need to be warranted because it is usually designed and purchased separately from the acquisition of the rifle.

The new provision retains the exclusion that warranties are not required for weapon systems or their components when the government provides these items to the contractor.[77] The government, nevertheless, may require the prime contractor who installs these components to warrant that the components have been installed properly so the component manufacturer's warranty is not invalidated.[78]

The most perplexing issue is whether components or subsystems of weapon systems must be warranted when they are purchased separately and not as an end item of the weapon system. The prior

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[74] 10 U.S.C. § 2403(a)(1) (Supp. V 1987).

[75] DFARS 246.770-1. Also, the term "weapon system" does not include commercial items sold in substantial quantities to the general public as described at FAR 15.804-3(c). *Id.*

[76] *Id.*

[77] 10 U.S.C. § 2403(c) (Supp. V 1987). Such items are referred to as government-furnished property (GFP), equipment (GFE), or materials (GFM). It is common for the government to purchase weapon system components under separate contracts and then provide these items to a prime contractor for assembly into the end item. Although the prime contractor does not warrant these items, warranties may be required in the individual contracts that procured the items.

[78] Id. § 2403(g)(2).

statutory warranty requirement included such components;[79] the current legislation instead merely requires warranties for ''items''[80] procured under weapon systems production contracts.[81] The intent of the warranty provision would seem to include components; nonetheless, the word ''components" was conspicuously deleted from the legislation.[82]

The DFARS, however, requires warranties only for systems or major subsystems of a major weapon system.[83] The Department of the Army has further decided that only items subordinate to the weapon system level that are 1)depot reparable or depot recoverable;[84] and 2) occur no lower than level 3 of the work breakdown structure[85] for prime mission hardware are covered by the statutory warranty requirement.[86]

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[79]Pub. L. No. 98-212, § 794(a), 97 Stat. 1421, 1454-55 (1983), repealed by Department of Defense Appropriations Act of 1985, § 1234(b)(1), 98 Stat. 2492, 2604 (1984).

[80]The term "item" is not defined in the statute.

[81]10 U.S.C. § 2403(b) (Supp. V 1987).

[82]The Senate committee report explains the deletion of components as being otherwise administratively unworkable. The committee believed that the prior legislation required the government to obtain a direct warranty from every subcontractor. The government now only obtains a warranty from the prime contractor that covers the subcontractor's components. The report does not explicitly address whether the government is required to obtain warranties from the manufacturer of components that are furnished to the prime contractor as GFP. See S. Rep. No. 500, 98th Cong., 2d Sess. 248 (1984). The current legislation implies that obtaining such warranties is expected, if not required.

> (g) Nothing in this section prohibits the head of the agency concerned from—
> , . . .
> (2) requiring that components of a weapon system furnished by the United States to a contractor be properly installed so as not to invalidate any warranty or guarantee provided by the manufacturer of such component to the United States

10 U.S.C. § 2403(g)(3) (Supp. V 1987).

[83]DFARS 246.770-1.

[84]The Army maintenance system consists of five levels of maintenance: operator; organizational; direct support; intermediate-general support; and depot. Defective equipment that is beyond the repair capabilities of support units is returned to the depots for repairs.

[85]The three levels of the work breakdown structure are:

Level 1 is the entire defense materiel item; for example, the Minuteman ICBM System, the LHA Ship System, or the M-109A1 Self-propelled Howitzer System.

Level 2 elements are major elements of the defense materiel item; for example, a ship, an air vehicle, or a tracked vehicle.

Level 3 elements are subordinate to level 2 major elements; for example an electric plant, an airframe, the power package drive train, communications and control system. Military Standard-881A, para. 3.5.1. (Apr. 25, 1975).

[86]AR 700-139, para. 4-7a(3). This definition of "subsystem" is identical to the Army's interpretation of the term "component" under the prior legislation. See letter from L.F. Skibbie, Deputy Commanding General for Materiel Readiness of the U.S. Army Materiel Development and Readiness Command, to Subordinate Commanders (Aug. 14, 1984). The current statute is of very little help because it defines "component" as any constituent element of a weapon-system. See 10 U.S.C. § 2403(a)(5) (Supp. V 1987).

The Army believes that it is not cost effective to obtain warranties on items that do not fit within the above criteria. Items that are expendable or have a low repair cost do not justify the administrative costs of enforcing the warranty. The Army has decided also that the depot level is the most efficient level for government-contractor interface. Thus, only those items normally returned to the depot for repairs should be returned to the contractor. To allow every user of the end item to deal directly with the contractor would be unmanageable. Although only depot-recoverable items are warranted, it is Army policy for warranties to cover maintenance actions authorized to be accomplished at the intermediate-general support level.[87]

A related question is whether spare parts must be warranted. DOD's guidance under the prior legislation was that spare parts did not usually have to be warranted.[88] The language of the present statute, however, appears to include spare parts that are procured under a weapon system's production contract,[89] but the current guidance in the DFARS by implication exempts spare parts.[90] If the statute's only intent is to ensure the adequacy of the basic system's design and its production quality, then excluding spare parts comports with that objective.

The new revision also excluded low-cost weapon systems from the requirement for warranty coverage. Unlike the prior statutory requirement, warranties are now required only for weapons systems that cost more than $100,000 each or for which the eventual total procurement cost is more than $10,000,000.[91]

The most significant difference in the new provision is that the essential performance requirements warranty is required only for weapon systems that are in mature full-scale production.[92] Mature

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[87] Letter from General Richard H. Thompson, Commander, U.S. Army Materiel Command, to Subordinate Commanders (May 13, 1985), reprinted in HQ AMC Acquisition Letter 85-22 (Dec. 23, 1985). Because the preponderance of the U.S. Army Aviation Systems Command's maintenance actions are at the depot level, it is authorized to exclude intermediate-general support level maintenance frcm its warranties. Id,

[88] Taft memorandum, supra note 53.

[89] The statute requires warranties on "items" procured under weapon system contracts. 10 U.S.C. § 2403(b) (Supp. V 1987). These spares are referred to as "concurrent spares."

[90] "Acquisition of warranties in the procurement of supplies that do not meet the definition of a weapon system (e.g. spare, repair, or replenishment parts) is governed by FAR 46.7 [not by DFARS 246.7]." DFARS 246.703.

[91] 10 U.S.C. § 2403(a)(1) (Supp. V 1987).

[92] Id. § 2403(f).

full-scale production begins after one-tenth of the eventual total production has been manufactured, or after the first year of full-scale production, whichever is earlier.[93] In dual source procurements, the performance warranty is not required for the first one-tenth of the second source's eventual total production quantity.[94]

The statute does not, however, prohibit the government from negotiating an essential performance requirements warranty on weapon systems not yet in mature full-scale production.[95] In fact, when such contracts do not include this warranty, the Secretary of Defense must provide the same notice to Congress that is required when a waiver is granted.[96]

This revision was intended to assuage one of the defense industry's major concerns—the uncertainty of whether a weapon system as designed will actually meet its essential performance requirements.[97] Theoretically, by delaying the application of the warranty, both the government and the contractor should have a more realistic understanding of the capabilities of the system by the time the warranty is negotiated. Only the application of the warranty should be delayed. Designing the desired reliability of the system to be covered by the warranty should begin early in the acquisition life cycle.[98] By delaying the application of the warranty, the warranty's cost should be more clearly defined, resulting in a reasonable warranty price.[99] Because the risk of the initial production has been eliminated, the impact of the warranty requirement on small businesses is also mitigated considerably.[100]

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[93]Id. § 2403(a)(6), (7).
[94]Id. § 2403(g)(4).
[95]Id. § 2403(f).
[96]Id. See supra notes 67-70 and accompanying text for notice requirements. Contracting officers must ensure that the notice requirement is not overlooked for the low-rate initial production items. See infra note 98.
[97]*See supra* note 38 and accompanying text.
[98]The five phases of the acquisition life cycle are: 1) concept exploration and definition; 2) concept demonstration and validation; 3) full-scale development; 4) production and initial deployment; and 5) operations support. Dep't of Defense Directive 5000.1, Major and Non-major Defense Acquisition Programs, para. D.3. (Sep. 1, 1987). The Army includes a sixth phase between the full-scale development phase and the full-rate production and initial deployment phase. The sixth phase is the low-rate initial production phase. Army Reg. 70-1, Systems Acquisition Policy and Procedures, para. 3-7 (Oct. 10, 1988). DOD considers low-rate initial production as part of the full-scale development phase. Dep't of Defense Directive 5000.2, Defense Acquisition Program Procedures, para. D.3.a. (Sep. 1, 1987). In fact, low-rate initial production quantities are often options under the full-scale development contract.
[99]See S. Rep. No. 500, 98th Cong., 2d Sess. 248 (1984).
[100]See supra notes 42 & 73 and accompanying text.

This theoretical result, however, disregards the normal sequence of government procurements. The contract for mature full-scale production is almost always negotiated before the initial production quantity has been completed and fully tested. In fact, mature full-scale production and initial production quantities, other than low-rate initial production items, normally are part of the same contract. Thus, the procurement sequence must be altered to allow both the contractor and the government sufficient time to evaluate the adequacy of the initial production item before finalizing the performance warranty applicable to the mature full-scale production quantity.[101]

Even if the government requires a performance warranty on the initial production quantity, theoretically the risks of the warranty should be minimal. If extensive testing was conducted during the development and evaluation stages of the acquisition, both the government and the contractor should know before full-scale production whether the weapon system meets all of its essential performance requirements.

It must be remembered that although the essential performance requirements warranty does not apply to the initial production quantity, the warranty covering defects in materials and workmanship and the warranty requiring conformity to the design and manufacturing specifications apply to items at all stages of production.

Although the warranty requirement does not apply to foreign military sales (FMS) production contracts,[102] DOD's policy is to obtain the same warranties on conformance to design and manufacturing requirements and against defects in materials and workmanship that are obtained for United States supplies.[103] Usually, DOD will not, however, obtain essential performance requirements warranties for FMS customers.[104]

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[101] If a sole-source production contract is expected, negotiating a cost-effective warranty at this point will, of course, be more difficult than if it had been negotiated in a competitive environment. For a good discussion of acquisition strategy and warranty development over the system life cycle, see generally H. Balaban, K. Tom & G. Harrison. Jr., Warranty Handbook, ch. 5, at 5-1 (1986) (Defense Systems Management College text).

[102] DFARS 246.770-7.

[103] *Id.*

[104] *Id.*

> However, where the cost for the warranty of essential performance requirements cannot be practically separately identified, the foreign purchaser may be provided the same warranty that is obtained on the same equipment purchased for the U.S. If the FMS purchaser expressly requests a performance warranty in the Letter of Acceptance (LOA), the United States will exert its best efforts to obtain the same warranty contained on U.S. equipment or, if specifically requested by the FMS purchaser, a unique warranty.

Id.

The current statutory warranty requirement applies only to DOD and does not apply to the Coast Guard or to the National Aeronautics and Space Administration (NASA).[105] There is, nonetheless, another statute that makes warranties applicable to major system acquisitions of the Coast Guard.[106]

One interesting development is that DOD has revoked its blanket waiver of the warranty requirement for cost-type contracts.[107] Current DOD guidance states that waivers for cost contracts must be justified on the same case-by-case basis as is required for all other contract types.[108] Because the performance warranty applies only to mature full-scale production contracts, the majority of which are fixed-price contracts, requests for waivers in cost-type contracts should be minimal.

IV. DRAFTING WARRANTY CLAUSES

A. STATUTORY AND REGULATORY GUIDANCE

The warranty statute recognizes that the government must tailor the specific details of the warranty clause for each procurement. It allows for reasonable exclusions, limitations, and time durations as

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[105] 10 U.S.C. § 2403(h)(2) (Supp. V 1987).

[106] For necessary expenses of acquisition, construction, rebuilding, and improvements of aids to navigation, shore facilities, vessels, and aircraft, including equipment related thereto; to remain available until September 30, 1990, $217,300,000:Provided, That the Secretary of Transportation shall issue regulations requiring that written warranties shall be included in **all** contracts with prime contractors for major systems acquisitions of the Coast Guard: Provided further, That any such written warranty shall not apply in the case of any system or component thereof that has been furnished by the Government to a contractor: Provided further, That the Secretary of Transportation may provide for a waiver of the requirements for a warranty where: (1) the waiver is necessary in the interest of the national defense or the warranty would not be cost effective; and (2) the Committees on Appropriations of the Senate and the House of Representatives are notified in writing of the Secretary's intention to waive and reasons for waiving such requirements: Provided further, That the requirements for such written warranties shall not cover combat damage.

Pub. L. No. 99-190, 99 Stat. 1185, 1269 (1985) (reprinted at 10 U.S.C.A. § 2304, note (West Supp. 1989)). Because this statute applies to all major systems acquisitions, it applies to a broader spectrum of items. The DOD requirement only applies to major weapon systems. 10 U.S.C. § 2403(b) (Supp. V 1987).

[107] *See* DFARS 246.705(a). For a discussion of the propriety of the prior blanket waiver, see Comp. Gen. Dec. B-214690, Apr. 24, 1984 (GAO questioned the legality of the blanket waiver). ***See also supra*** notes 54-58 and accompanying text.

[108] DFARS 246.770-9.

long as the negotiated warranty is consistent with the general requirements of the statute.[109] Accordingly, the DFARS does not include a sample clause but instead requires contracting officers to tailor the warranty language on a case-by-case basis.[110] The DFARS authorizes the contracting officer to exclude certain defects from the warranties and to limit the contractor's liability if necessary to derive a cost effective warranty. This is in light of the technical risk, the contractor's financial risk, and other program uncertainties.[111] Likewise, DFARS allows the contracting officer to narrow the requirements of the warranties, such as when demanding a warranty covering all essential performance requirements would be inequitable because the contractor had not designed the system.[112] Finally, the contracting officer may expand the scope of the warranty by making it more comprehensive if doing so is in the best interests of the government.[113]

Unfortunately, there are no reported administrative or judicial decisions interpreting the statutory warranty requirement. Although guidance from these sources is not available regarding weapon system warranties, there are numerous decisions dealing with supply and construction warranties. Some of these decisions will be discussed later in this article, and they provide some insight as to how weapon system warranties may be interpreted.

As in all contract actions, the government should attempt to reach an agreement that is fair and reasonable to both parties. Above all, it should be stressed that warranties are never a substitute for a comprehensive quality assurance program; they are only one ingredient of such a program.

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[109] 10 U.S.C. § 2403(g)(1) (Supp. V 1987).

[110] DFARS 246.770-3. Although the DFARS does not contain a sample clause, such clauses abound throughout DOD. A sample clause was provided in DOD's guidance under section 794. *Supra* note 53. Another sample clause was provided in Army Acquisition Letter **85-2,** Warranties (Jan. 14, 1986). DARCOM Pamphlet 5-1, The Joint Engine Warranty Development Guide (Oct. **26,** 1984), contains a clause for aircraft engines. The Appendix to this article is a warranty clause that was used in the Multiple Launch Rocket Systems (MLRS) production contract.

[111] DFARS 246.770-3.

[112] *Id.*; *see also* H.R. Conf. Rep. No. 691, 98th Cong., 2d Sess. 324, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4258, 4303. *But cf.* Lambert, *Warranties--They Are Here To Stay,* Army RD&A, Jan.-Feb. 1986, at 20 (author implies that some degree of tailoring is impermissible and, thus, requires an approved waiver); *see also* Air Force Acquisition Reg. Supp. 46.770-3 (prohibits contracting officer from exempting any essential performance requirement from the warranty).

[113] 10 U.S.C. § 2403(g)(5) (Supp. V 1987); DFARS 246.770-3.

B. WARRANTY COVERAGE—INDIVIDUAL VS. SYSTEMIC DEFECTS

Warranties normally cover individual item failures, systemic defects, or both. Under individual item failure warranties, whenever a failure occurs and is covered by the warranty's terms the government **will** assert a claim. Under systemic defects warranties, the government **will** not assert a claim until a sufficient number of recurring individual failures occurs evidencing a systemic defect in the design **or** manufacturing process.

Individual failure warranties are appropriate when it is cost effective to process every claim. If it is not cost effective to process every claim, then a systemic defects warranty should be used.[114] Additionally, an individual failure warranty is not appropriate if most of the items **will** not **be** used during peacetime. Missiles that probably will never be fired during peacetime, but will only be stored, are not candidates for this type of warranty because individual item defects for the majority of the missiles would never be discovered. On the other hand, vehicles and expensive communications equipment that are in constant use during peacetime are prime candidates for the individual failure warranty.

Whenever a contract will include a warranty, the contracting officer should consider the inclusion of a systemic defects warranty. The warranty should provide that whenever the government determines that a systemic defect exists, the contractor must conduct a study to determine the source of the defect and the corrective action required. The remedies under the warranty should include: correcting **all** items in the inventory in which the defect may exist; altering the manufacturing process to preclude such defects in future deliverables; and totally redesigning the system if necessary. To preclude any dispute **as** to whether a systemic defect exists, the warranty should provide that a predetermined number of failures or defects is per se proof of a systemic defect.

The duration of the systemic coverage should begin with the delivery of the first item and end on the expiration date of the warranty covering delivery of the last item.[115] Thus, the systemic warranty's duration is often more extensive than the duration of the individual failure warranty. Under the systemic defects warranty, if

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[114] *See* **AR 700-139, para.** 4-8a.
[115] *See id.* **para.** 4-8b(5).

a lengthy period of time exists between the delivery of the first and the last items, the first item must be corrected, even if the individual failure warranty covering that item has already expired.

C. ESSENTIAL PERFORMANCE REQUIREMENTS WARRANTY

Pursuant to the essential performance requirements warranty, the weapon system must meet the operating capabilities and maintenance and reliability characteristics that the Secretary of Defense determines necessary for the system to fulfill its designated military missions.[116] Within the Department of the Army, the authority to establish essential performance requirements has been delegated to the heads of the contracting activities.[117] Prior to negotiating the warranty clause, the contracting officer, with the assistance of the weapon system's project technical experts and the approval of the head of the contracting activity,[118] must establish the weapon system's essential performance requirements.

After the essential performance requirements have been established, the contracting officer must then determine which essential performance requirements should be covered by the warranty. He should consider exercising his authority to exclude some performance requirements from the warranty's coverage[119] when a comprehensive warranty would be inequitable. During contract negotiations, contractors will inevitably attempt to lower the performance requirements to a level that places minimal risk on them. Although the government should resist such efforts, it must also ensure that the performance requirements are not overly risky for contractors. Otherwise, contractors will probably use more costly current technology instead of pushing the state of the art. Inhibiting technological innovation is not only uneconomical for the government, but it also impairs national security. Obviously, narrowing the scope of the warranty reduces the cost of the warranty. The government, however, should not be too lax in this regard. Otherwise, the intent of Congress in enacting the statute will be obviated.

At the end of the negotiations, the essentiai performance requirements must be clearly delineated in the contract to preclude

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[116] 10 U.S.C. § 2403(a)(4) **(Supp.** V 1987).
[117] AFARS 46.770-4.
[118] *See* ***id.***
[119] *See supra* notes 111 & 112 and accompanying **text.**

later disputes over which performance requirements are, indeed, covered by the warranty.[120]

Once the contracting officer has decided which essential performance requirements must be warranted, he must then determine which type of performance warranty is appropriate. The two most widely used performance warranties are the failure-free warranty and the expected failure warranty. Under a failure-free (or zero defects) warranty, the contractor must correct all failures. Under an expected failure warranty, the contractor is required to correct an item only after the item has experienced a predetermined number of failures.

1. Failure-free Warranty

The failure-free warranty is the easier to draft, but it is also more expensive. Although this warranty is used extensively and successfully in the commercial market place, it is not as applicable to the procurement of weapon systems. DOD rarely, if ever, purchases weapons under specifications requiring one hundred percent performance reliability. Usually, some deviation within specified tolerances is allowed.[121] Accordingly, it is unwise for DOD to require a failure-free warranty on such items and to shift the risks of acceptable failures to the contractor.

The failure-free warranty is, nonetheless, often dictated by necessity. To use any other warranty requires strict documentation of the item's history of failures to determine the point where the contractor is responsible for correcting further failures. Often this is difficult and costly, especially for low cost items. Finally, this warranty must be used when reliability factors cannot be predetermined by any accurate means, or if, in fact, one hundred percent reliability is justified.

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[120] GAO has criticized DOD for not adequately identifying essential performance requirements in weapon system contracts. ***See*** General Accounting Office, Report **NSIAD-87-122** (July 27, **1987).** Often government contracts merely state that all performance standards and requirements in the technical data packet and technical manuals are warranted. This is broader than the statue requires, but may be the most prudent approach to effectuate the intent of Congress. *But* ***see infra*** text at sec. IX.A.

[121] There is a movement afoot within DOD to remove Acceptable Quality Levels (AQL) and Lot Tolerance Percent Defect (LTPD) requirements from military specifications and standards. DOD still allows, however, the use of these measures as acceptance inspection parameters. ***See*** letter from the Assistant Secretary for Defense for Production and Logistics to Service Quality Assurance Offices (Oct. **16, 1987);** ***see also*** Army Acquisition Letter 88-5 (Feb. 1, **1988).**

2. *Expected Failure Warranty*

The expected failure warranty is the most common warranty covering weapon systems. Because one hundred percent performance reliability is not usually required, a predictable number of failures can be expected to occur when the item is operating within its designed reliability. The expected failure warranty excuses these failures. The main benefit of this warranty over the failure-free warranty is that when the number of actual failures is below the number of expected failures, the government has achieved an increase in product reliability with a resulting cost avoidance.[122]

To use an expected failure warranty, the government must have some means to measure the degree of failure permitted before the risk shifts to the contractor. These measures are expressed in a variety of ways. Some of the common methods used to define the expected failures are: mean time between failures (MTBF);number of failures; operational readiness; and useful life.

Mean time between failures measures the average duration that a system is capable of continuous operations. It is expressed as:

> MTBF = the total duration that the system is operational over X time (divided by) the total number of failures over X time.

The MTBF for a jet engine might be expressed as:

> MTBF = total flight hours during a three month period (divided by) the total number of breakdowns during those three months.

MTBF can also be expressed in terms other than duration. For rocket launchers, it is often the number of rockets launched divided by the number of failures. For vehicles, it is often the number of miles they can be driven between breakdowns.

The contract must specify the period over which MTBF is computed. To ensure a meaningful and realistic MTBF, the contract must allow a sufficient period.

The second method, the number of failures, is frequently used because of its simplicity. This measurement merely specifies the

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[122] *See* **AR** 700-139, **para. 4-2a.**

number of failures per item that will be corrected at government expense. After that number is exceeded, the remedies of the warranty are enforced against the contractor.

Operational readiness (sometimes referred to as availability) is another measure of a system's reliability. It measures the time that the system was fully operational over a continuous period of time and is normally expressed as a percentage. It is often computed by dividing the time that the system was available for full operational use by the sum of operational time plus downtime (e.g., not operational due to maintenance or repairs). It is useful for items that must be available for continuous use, such as communication equipment and radar. The essential performance requirement specifies the degree of operational readiness required. When this percentage is not maintained, the contractor must determine the reason for the excessive downtime and must take corrective actions to ensure the performance requirement is met in the future. To use this measurement effectively, the extent of downtime must be solely within the control of the contractor and not influenced by government-caused hindrances, such as repair part distribution problems.

Another familiar essential performance requirement is the useful life of an item. For a howitzer tube, the useful life might be expressed as the minimum number of rounds fired before the tube must be replaced or rehabilitated. The useful life for jet engines is expressed in flight hours, while for wheeled vehicles it is miles driven. Requiring a warranted useful life is especially appropriate for items that are not economically repairable, such as micro chips.

Although there is a plethora of commonly used performance requirements, such as aircraft engine thrust; fuel consumption; maximum speed; survivability; aircraft landing and distance requirements; aircraft rate of climb; ability to endure weather, pressure, and temperature extremes; and target accuracy of a projectile, performance requirements are as diverse as the military missions that each weapon system must accomplish.

3. Logistic Support Costs

Logistic support costs are the costs necessary to maintain and repair a weapon system. Although these costs are normally not thought of as performance requirements, consideration should be given to designating them as such. If, when warranted, the logistic support costs exceed the specified target costs, the contractor must then

determine the cause of the overrun and make corrections to bring these costs within the target amount.

This warranty frequently requires the contractor to share the excess support costs. As an extra incentive, the contractor should also share a portion of the savings when the costs are below the guaranteed amount. This incentive warranty is known as a reliability improvement warranty, the intricacies of which are beyond the scope of this article.[123] The Air Force has effectively used this type of warranty on its F-16 fighter jet.[124]

D. DESIGN AND MANUFACTURING WARRANTY & WORKMANSHIP AND MATERIALS WARRANTY

The design and manufacturing warranty guarantees that the weapon was produced in accordance with the specifications contained in the contract. These specifications include structural and engineering plans and manufacturing particulars, such as precise measurements, tolerances, material characteristics, and finished product test~!~~

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[123]For a further discussion of reliability improvement warranties, see generally Solomond, *Contractor Incentives to Improve Reliability and Support*, The J. Def. Sys. Acquisition Mgmt., vol. 5, no. 1(1982); Bilodeau, *The Application of Reliability Improvement Warranty to Dynamic Systems*, ARINC Research Corp., Pub. 2025 (AD-A075-52) (Sep. 1979); Army Reg. 702-3, Army Material Systems Reliability, Availability, and Maintainability (May 1, 1982). The Air Force's C-17 heavy-lift transport aircraft program uses an unique approach to essential performance requirements warranties. The contract has both award fee and incentive fee provisions. If the C-17 fails to meet any essential performance requirement, the contractor loses half of the total incentive fee and still is required to meet the essential performance requirements under the terms of the warranty.

Some commentators like to separate warranty functions into three distinct classifications: assurance-validation; insurance; and incentivization. Assurance-validation assures that the weapon system conforms to the contractual specifications. Insurance shifts the monetary risk from DOD to the contractor for contingent liabilities that arise after acceptance. Incentivization encourages the contractor to exceed minimum objectives through positive and negative incentives. For a further discussion of each function and an excellent theoretical economic analysis of each function, see R. Kuenne, P. Richanbach, F. Riddel & R. Kaganoff, Warranties in Weapon System Procurement: An Analysis of Practice and Theory (Apr. 1987) (paper prepared by the Institute for Defense Analyses for the Office of the Secretary of Defense, Director, Program Analysis and Evaluation) [hereinafter R. Kuenne]. The distinction among these functions is often blurred, and any extensive discussion of these distinctions in this article would not be helpful.

[124]*See generally* Hardy, *The F-16: A Successful Effort to Contain Logistic Support Costs*, 20 Def. Mgmt. J. 8 (1984); Crum, *An Interim Evaluation of the F-16 Reliability Program*, ARINC Research Corp., Pub. 2527 (Sep. 1981). The Air Force does not like to use the term "warranty" because it believes the word is too negative. Rather, the Air Force refers to these warranties as "product performance agreements."

[125]10 U.S.C. § 2403(a)(3) (Supp. V 1987); DFARS 246.770-1.

The workmanship and materials warranty covers defects in workmanship and materials used to produce the weapon. The warranty statute requires that weapon systems be free of all such defects.[126]

Numerous recent government contracts have mistakenly required the contractor to warrant only against workmanship and material defects that cause the weapon system to fail an essential performance requirement. Although this warranty would have satisfied the previous warranty legislation, it is repugnant to the current statutory requirement and prejudices the government's rights. Often, a workmanship or materials defect may not affect an essential performance requirement but may affect a tangential safety or security requirement. These defects will also need to be corrected. Thus, the contracting officer should always seek a broad warranty covering all defects in workmanship and materials unless such a warranty is not cost effective.

E. WARRANTY DURATION

The duration of the warranty will vary depending on the specific weapon system. **A** defect in a tank will probably be apparent shortly after the government takes delivery and tests it. **A** defect in a missile, however, may not be evident until years later when it is fired. In fact, if it is never fired, the government may never know of the defect.

A protracted warranty period aggravates the contractor's trepidation of being unable to obtain indemnification from its subcontractors for defects that are not discovered until the end of the warranty period.[127] The government must seriously consider the effect this will have on the amenability of prime contractors to subcontract with small businesses.

The means of defining the warranty period must be rational. In some contracts, the period is measured in time (e.g., years or months), while in other contracts periods measured in terms of mileage, usage hours, or rounds of ammunition fired in the weapon are more appropriate.

The contracting officer might even consider allowing the contractor to satisfy the warranty requirements if the weapon system passes

[126] 10 U.S.C. § 2403(b)(2) (Supp. V 1987).
[127] *See supra* notes 72 & 73 and accompanying text.

a government test. If this method is chosen, the test must ensure the discovery of all defects, or the warranty clause must extend the warranties to cover defects not discoverable by a reasonable test. This method should be used only if no other warranty is cost effective.

The procurement of the Peacekeeper missile illustrates the hazards of using this method. In 1985 the Air Force allowed the manufacturer of the missile's propulsion stages to satisfy the essential performance requirements warranty by passing lot acceptance tests. The Air Force Auditor General criticized this procedure because it did not protect the government from deterioration of essential performance requirements due to aging during the missile's useful life.[128]

More importantly, the clause should not state that the contractor warrants that no defects exist at the time of delivery, but rather it should state that no defects exist during the duration of the warranty. To do otherwise may cause the government difficulties in proving that the defect existed at the time of delivery. In *Phoenix Steel Container Company*,[129] a contractor argued before the Armed Services Board of Contract Appeals that had a defect existed at the time of delivery it would have been discovered by the government's comprehensive acceptance inspection. The board agreed and found that the government had failed to prove that the defect existed at the time of delivery, although the defect was later discovered.[130] The warranty clause in that case covered only defects that existed at the time of delivery.

Furthermore, if the government discovers a defect during the acceptance inspection, the contractor should be notified immediately of the defect and its unacceptability. In *Gresham & Company, Inc. v. United States*[131] the Court of Claims held that when a government

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[128] *See* U.S. Air Force Audit Agency, Warranty Management of Peacekeeper Propulsion Stages and Ordnance Initiation Sets, Report of Audit 6036313 (Feb. 9, 1987) (implies that warranty duration should have been the entire useful life). Also, in the procurement of 950-pound free fall cluster weapons (CBU-87/B), the Air Force used a warranty test. Besides not being cost effective, the test failed to validate all of the essential performance requirements because the test plan was not properly formulated. ***See*** U.S. Air Force Audit Agency, Combined Effects Munitions Acquisition Management, Report of Audit 6036312 (Dec. 1, 1986).

Tests not called for by the contract have been accepted as a proper basis for rejection of a product as long as the tests do not impose a more stringent requirement than required by the contract. ***See*** Crown Coat Front Co. v. United States, 292 F.2d 290, 292 (Ct. Cl. 1961); TEMCO, Inc., ASBCA No. 9588, 65-1 BCA 14822, at 22,843.

[129] ASBCA No. 9987. 66-2 BCA ¶ 5814.

[130] *Id.* at 27,032-33; ***see also*** Bramson Eng'g Co., ASBCA No. 6086, 61-1 BCA ¶ 3035.

[131] 470 F.2d 542 (Ct. Cl. 1973).

inspector became aware of a patent defect, the failure to inform the contractor that it was unacceptable resulted in a waiver of the requirements of the specification. Because of the waiver, the item conformed to the specification, and there could be no breach of the warranty—even though it originally covered such defects.[132]

The result, however, is not the same if the government was unaware of the defect, even though a reasonable inspection would have revealed the defect.[133] The Armed Services Board of Contract Appeals, in *Market Equipment, Ltd.*,[134] stated that one of the prime purposes of a warranty is to exempt the government from the necessity of exercising extreme diligence in its acceptance inspections.

The warranty duration must be sufficient to ensure the integrity of the weapon's design and the manufacturing process. To compute the warranty duration, two elements must be considered. First, the contracting officer must determine the amount of operational use (actual use) necessary to ensure that the warranties are satisfied.[135] According to Army policy, this period should normally be between ten and twenty percent of the item's expected useful life.[136] This time must then be added to the time normally required from the date the government accepts the item until the item is actually placed in operational use.[137] These deployment delays are attributed to storage, transportation, issuance, and installation of the item.

If the item will become government-furnished property that will be incorporated into a higher weapon system, then the time until the higher weapon becomes operational must also be included.[138] In 1986 the U.S. Army Materiel Command learned this lesson the hard way when it discovered that the warranty coverage on new factory-installed avionics equipment had expired before the aircraft were delivered to the operational units.[139]

Items such as missiles that have a long storage duration and,

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[132] *Id.* at 555-56.

[133] *E.g.*, **Market Equip., Ltd., ASBCA** No. **9639, 65-1 BCA ¶ 4608, at 22,008,** ***mot. for reconsideration denied,*** **65-1 BCA ¶** 4821.

[134] *Id.*

[135] **AR 700-139, para.** 4-9b.

[136] *Id. But cf.* **Report of Audit 6036313,** ***supra*** **note 128.**

[137] **AR 700-139, para.** 4-9c.

[138] *Id.* **para.** 4-9b; ***see also supra*** **note 77.**

[139] ***See*** **U.S. Army Material Readiness Support Activity, Avionics Warranties: Lessons Learned, Agency Report RCS AMCSM-1021 (Oct. 1986) (report available from the Defense Logistics Studies Information Exchange, LD** 70290AX).

possibly, no projected operational use during peacetime, pose unique problems. Normally, systemic defects warranties will be used for these items. The duration of these warranties must allow for testing of a sufficient representative sample and evaluation of the effects of long term storage.[140]

The contract must specifically define the commencement and termination dates. Before these dates can be established, the contracting officer must decide whether the warranty will apply to individual items defects or to systemic defects. If the individual defects option is chosen, the warranty should begin upon the government's acceptance of each individual item and end when the warranty duration period of that particular item expires.[141] For systemic defects, the warranty should begin on the acceptance date of the contract's first individual item and end on the date computed by adding the basic warranty duration to the date of acceptance of the final production item.[142]

If the contact includes option quantities, the warranty clause must state specifically whether exercising the option extends the systemic defect coverage duration for the basic contract items or whether it begins anew only for the option quantities.

The government should consider tolling the warranty period in certain instances. For example, the contract might toll the warranty during the time that the items are inoperable while awaiting repairs or, perhaps, during the time when the contractor is trying to correct a systemic defect. Tolling may be appropriate if the production quantity is small. If the production quantity is large, tolling the warranty will often be administratively impermissible. Finally, the contract might provide that the warranty period begins anew when defective items are repaired or replaced.[143]

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[140] *See* Report of Audit 6036313, *supra* note 128.

[141] AR 700-139, para. 4-8c(1).

[142] *Id.* para. 4-8b(5).

[143] The warranty clause must clearly provide this. ***See*** Humphrey Heating and Roofing, Inc., ASBCA No. 29730, 85-1 BCA ¶ 17,769, at 88,751 (although warranty clause stated that the warranty "will run from one year from the date of repair or replacement," board held that this wording only applied to repair or replacement of government property damaged during performance because of its context with the entire clause).

F. CONDITIONS VOIDING THE WARRANTY & WARRANTY EXCLUSIONS

Defining the conditions that will void the warranty is an important aspect of the warranty clause. The contractor may insist that only its spare parts be used on the weapon system and that the government's use of spare parts obtained elsewhere will void the warranty.[144] In this situation, the government must determine the effect such a requirement will have on competition and future costs of spare parts. The contracting officer normally will discover that the long term effects of such a warranty are too pernicious.

Accordingly, the government should resist all attempts by contractors to place any anti-competitive restrictions on spare parts. Many contractors have allowed the government's use of non-contractor-approved parts as long as the warranty excludes failures due to such non-approved parts. Some contractors have further insisted that when non-military-specification spare parts are used, the burden shifts to the government to demonstrate that the substitute parts did not cause the failure.[145] This compromise seems equitable to both parties.

Furthermore, contractors may insist that the warranty clause permit only contractor personnel to maintain and repair the weapon system. Again, the contracting officer should resist all such attempts. Not only are these restrictions impracticable and anti-competitive, but they also adversely affect military readiness. When a weapon system deployed at sea or in combat needs immediate correction, these restrictions often will be impracticable. Moreover, they prevent military personnel from acquiring the maintenance expertise necessary when the warranty expires.[146] The warranty clause should also provide that the warranty is not voided by government-performed maintenance or repairs that are accomplished in accordance with standard Military Service Maintenance Procedures (e.g., technical manuals and bulletins) or any other applicable written instructions mutually agreed to during the period of the warranty.

Causes beyond the control of the contractor, such as fire, flood, crash, accident, explosion, sabotage, combat damage, and any act

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[144] For a discussion of the Army's breakout of spare parts program, see *supra* note 21. For a discussion on tying, see *supra* note 22.

[145] The burden would appear to be on the government even if the contract does not specifically provide so. *See supra* note 32 and accompanying text.

[146] *See infra* text at VI discussing implications on military readiness.

of God, should be excluded unless the technical data package specifically requires protection from such threats.[147]

Mishandling,[148] improper installation,[149] improper storage, improper use,[150] unauthorized or improper maintenance,[151] and improper modification[152] by the government should also be excluded. The warranty clause should place the burden on the contractor to prove that one of the above forces was the proximate cause of the failure. Although contrary to the normal practice of placing this burden on the government,[153] this provision properly allocates the burden on the contractor who is often better able to isolate the cause of a defect due to its superior technical knowledge of the weapon system and its design. This burden should be shifted only if the government has denied the contractor access to evidence necessary to meet its burden.

Some contractors have required exclusions for faded or chipped paint, scratches, dents, nicks, and any other cosmetic damage resulting from usual and customary use as long as they do not affect the weapon's effectiveness. Such exclusions are appropriate in most contracts. Indeed, unless the warranty explicitly provides otherwise, all deficiencies that are the result of usual wear or accident are excluded from the warranty.[154] Finally, contractors usually demand that the contract explicitly state that there are no other warranties, such as implied warranties of merchantability or fitness for a particular pur-

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[147] This is nothing more than a reaffirmation that failures caused by an external source, not by a defect created by the contractor, are not covered by the warranty.

[148] *See, e.g.*, George E. Jenson, Contractor, Inc., ASBCA No. 23284, 81-2 BCA ¶ 15,207, at 75,296 (improper use and abuse); Brown-Olds Plumbing and Heating Corp., ASBCA No. 4974, 59-1 BCA ¶ 2209, at 9635 (improper handling and faulty government installation).

[149] *See, e.g.*, Drake Am. Corp., ASBCA No. 4914, 60-2 BCA ¶ 2810, at 14,507 (improper installation, improper maintenance, and contaminated fuel); Brown-Olds Plumbing and Heating Corp., 59-1 BCA at 9635 (faulty government installation and improper handling).

[150] *See, e.g.*, George E. Jenson, Contractor, Inc., 81-2 BCA at 75,296 (improper use and abuse); Rentel & Frost, Inc., ASBCA No. 8966, 1963 BCA ¶ 3880, at 19,270 (improper operation); Wilkinson & Snowden, Inc., ASBCA No. 5833, 61-2 BCA ¶ 3120, at 16,204 (improper use).

[151] *See, e.g.*, Drake Am. Corp., 60-2 BCA at 14,507 (improper maintenance, improper installation, and contaminated fuel); Fire Detection Service, IBCA No. 90-1-4-71, 72-1 BCA ¶ 9385, at 43,576 (improper maintenance).

[152] *See, e.g.*, South Portland Eng'g Co., IBCA Nos. 770-3-69, 771-4-69, 69-2 BCA ¶ 8033, at 37,316 (unauthorized modification), *mot. for* ***reconsideration denied,*** 70-1 BCA ¶ 8092.

[153] *See, e.g.*, cases cited *supra* note 32.

[154] Klefstad Eng'g Co., VACAB No. 705, 69-1 BCA ¶ 7675, at 35,625.

pose. Regardless of whether contractors request this disclaimer, the Federal Acquisition Regulation requires it.[155]

The warranty's coverage of government-furnished property (GFP) extends only to proper installation by the contractor.[156] The government, however, may require the contractor to warrant these parts if the contract requires the contractor to modify or perform other work on the parts. In this case, the warranty will extend only to the modification or work performed on the GFP.[157] Although it is DOD policy to exclude from the warranty any liability for loss, damage or injury to third parties,[158] the warranty clause should explicitly hold the contractor liable for damage to GFP caused by a warranted defect.[159]

As was stated earlier in this article, DOD will obtain design and manufacturing warranties in foreign military sales (FMS) contracts, but DOD normally will not obtain essential performance requirements warranties for FMS customers.[160] Accordingly, the contract should state that items delivered to foreign customers are excluded from the production contract's essential performance requirements warranty. Because the costs associated with the design and manufacturing warranties will be different for FMS purchases (due to the overseas location and support environment and because performance warranties will not cover FMS items), the government should have the warranty costs proposed separately for domestic purchases and FMS purchases.[161] Furthermore, the contracting officer must ensure that the FMS customer bears all costs of administering the warranty, especially when claims will be asserted through DOD's system of enforcing warranties.[162]

The contract should also address the effect that a change order will have on the warranties. Often, contractors will demand that the

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[155]FAR 46.706(b)(1)(iii).

[156]*See* 10 U.S.C. § 2403(c) & (g)(2) (Supp. V 1987).

[157]*See* DFARS 246.770-5.

[158]*Id.* at 246.770-3.

[159]*See* Norfolk Shipbuilding & Drydock Corp., ASBCA No. 21560, 80-2 BCA ¶ 14,613, at 72,077, *modified in part upon reconsideration*, 81-1 BCA ¶ 15,056; Penn State Coat & Apron Mfg. Co., ASBCA No. 6151, 61-1 BCA ¶ 2902, at 15,160, *mot.* for *reconsideration denied*, 61-1 BCA ¶ 2967. In both of these cases, other provisions of the contract placed this liability on the contractor.

[160]DFARS 246.770-7 and *supra* note 104.

[161]*But cf. supra* note 104 (DFARS indicates that sometimes the cost for the performance warranty cannot be practically separately identified). Separate pricing is necessary because quite often foreign military sales requirements are fulfilled by existing production contracts for domestic weapon systems.

[162]DFARS 246.770-7.

issuance of a unilateral change order will alter the warranties. Contractors rightly desire this protection if the change order modifies the system's design or the manufacturing process. The issuance of a change order that does not preclude the weapon from meeting the warranted requirements should not alter the terms of the warranty. The burden, however, will probably be on the government to prove that the unilateral change order did not have such an effect.[163]

Whenever the government approves an engineering change proposal (ECP), the incorporation of the change into the contract should specifically state that the change does not affect the warranties. Equally important, the contracting officer must expeditiously act upon ECP's so that approved changes can be incorporated into the production units quickly.[164]

G. NOTICE & RETURN PROCEDURE

The contract should address the period of time in which the government must notify the contractor of a defect.[165] If no specific time or procedure is stated, the government must give notice within a reasonable time and manner after it discovers (or should have discovered) the defect.[166] The contracting officer should eliminate any potential ambiguity in this regard by specifying in the contract a time period and procedure for notifying the contractor. The contracting officer must ensure that the notice is given within the specified time; otherwise, the breach of warranty claim will be barred.[167]

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[163] *See* Kalcor Coating Co., GSBCA No. 3572, 74-1 BCA ¶ 10,468.

[164] Consideration should be given to allowing the contractor to make no-cost design changes without government approval if the changes do not affect material or performance requirements. Most government configuration management personnel, however, oppose such requests for good reason.

[165] *See* FAR 46.706(b)(4). For adequacy of notice, see United States *ex rel.* Constr. Prods. Corp. v. Bruce Constr. Corp., 272 F.2d 62 (3d Cir. 1959); Harrington & Richardson, Inc., ASBCA No. 9839, 72-2 BCA ¶ 9507; Phoenix Steel Container Co., ASBCA No. 9987, 66-2 BCA ¶ 5814; Utility Trailer Sales Co., ASBCA No. 4689, 58-2 BCA ¶ 1948, *mot.* for ***reconsideration denied,*** 59-1 BCA ¶ 2085.

[166] J.R. Simplot Co., ASBCA No. 3952, 59-1 BCA ¶ 2112, at 9069, *mot.* for ***reconsideration*** *denied,* 59-2 BCA ¶ 2306; ***see also*** Price Battery Corp., ASBCA Nos. 1097, 1098 (Oct. 28, 1952) (four month delay reasonable, but seven and one-half month delay unreasonable).

[167] *E.g.*, Omega Container, Inc., ASBCA No. 30825, 86-1 BCA ¶ 18,733, at 94,265; Nevil Storage Co., ASBCA No. 3234, **57-2** BCA ¶ 1508, at 5253.

The DOD Inspector General has criticized the Army for failing to return 54% of the defect parts of the fiscal year 1984 Patriot missile system production contract within the four-month period required by the warranty's implementation plan. Consequently, these defects were not corrected under the warranty. ***See*** Acquisition of the Patriot Missile System, DOD Inspector General Audit Report No. 89-103 (Aug. 28, 1989).

Once a defect is discovered, the government must decide which remedy to pursue. When the government requires the contractor to make the corrections, the contract should specify a procedure for returning the items to the contractor. That provision should state that the government will return the defective item to a particular repair point within a certain time. The repair point normally will be either a government facility or the contractor's facility; however, for vital weapon systems that are not easily transported, the repair point should be the user's location.[168] Both government and contractor representatives should, when feasible, concurrently inspect the item to evidence the existence and extent of the defect.

The warranty clause should provide that the government may change the remedy chosen, even after election by the government, as long as the contractor has not relied to its detriment on the original election.[169]

One issue that has repeatedly caused problems is when the government returns allegedly defective items to the contractor, but, upon testing by the contractor, no defects exist.[170] To alleviate this problem, the contract should allow a maximum number of such returns before the contractor is entitled to an equitable adjustment for this unnecessary testing.

Other issues that need to be addressed in this section of the warranty are the time allowed for repairs, the use of government repair parts that are already available at the contractor's facility, and the transportation responsibilities of each party.

H. LIMITATION OF CONTRACTORS' MONETARY RISK

The most important concern of any contractor is to limit its monetary liability under the warranty clause. Recently, contractors have vigorously sought to negotiate a cap on their monetary liability. The DFARS permits the contracting officer to place such a limit on the contractor's liability.[171] Although the statute does not expressly permit this, the legislative history supports the notion that an assessment against the contractor of less than full costs is appropriate in

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[168] Army policy is to return defective equipment to a depot or to the contractor's facility.

[169] *See* General Optical, Ltd., ASBCA Nos. 25387, 25593, 85-1 BCA ¶ 17,844, at 82,323.

[170] These are commonly referred to as "retest-O.K."

[171] DFARS 246.770-3. *See generally infra* text at IX.C.

many situations.[172] Instead of an absolute cap, some contracting officers have successfully negotiated a warranty that requires the contractor to bear the cost of repairs to a specified limit; then, further costs are shared by the government and the contractor.

A limitation on monetary liability is one of the most readily available means of keeping a warranty cost effective for the government. Its use, however, should not be abused.

I. REMEDIES

The most important aspect of any warranty is the remedies afforded the government in the event of a breach by the contractor. The statute provides two remedies: the contractor may promptly correct the defect at no additional cost to the government; or the government may obtain the necessary corrective action from another source and recoup the reasonable costs of correction from the contractor.[173] Corrective action includes repair, replacement, or redesign,[174] whichever is most appropriate.[175] The DFARS provides a third remedy of equitably reducing the contract price.[176] The government has the election of selecting the remedy.[177] No matter which remedy is selected, the contractor will not be liable for any loss, damage, or injury to third persons.[178]

Congress contemplated that the government would select the first remedy whenever the contractor is prepared to promptly correct the defect.[179] Obviously, if the system is deployed at sea or in combat, this remedy may not be feasible. For weapon systems deployed overseas, unless the contractor has a repair facility at the overseas location, the government must evacuate the defective item to the

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[172] *See* Senate Rep. No. 500, *supra* note 99, at 246.

[173] 10 U.S.C. § 2403(b)(4) (Supp. V 1987).

[174] A redesign warranty for systemic defects causing a failure of the essential performance requirements must be included in all warranty contract clauses. U.S. Army Materiel Command Supp. 1 to AR 700-139 (Sep. 19, 1986). DOD has been criticized for its failure to include redesign remedies. *See* GAO report, NSIAD-87-122, *supra* note 120. A change to DFARS is pending that would require redesign as an available remedy whenever essential performance requirements are warranted. *See* 54 Fed. Reg. 27655 (1989)(proposed June 30, 1989). The Council of Defense and Space Industry Associations has strenuously opposed the proposed change. *See* 52 Fed. Cont. Rep. (BNA) 481 (Sept. 18, 1989).

[175] DFARS 246.770-2(a)(2)(i).

[176] *Id.* at 246.770-2(a)(2)(iii).

[177] 10 U.S.C. § 2403(b) (Supp. V 1987). Under the prior legislation, DOD did not have this election of remedies. *See supra* notes 9 & 10 and accompanying text.

[178] DFARS 246.770-3.

[179] *See* Senate Rep., *supra* note 99, at 245.

United States for correction if the first remedy is chosen. The transportation time may be unacceptable to military readiness. Accordingly, another remedy would be more propitious in these situations.

When the government affords the contractor the opportunity to correct the defect, the government should require the contractor to bear all of the costs, including the transportation expenses.[180] Interestingly, the Armed Services Board of Contract Appeals in *Platt Manufacturing Company*[181] held that the risk of loss for items returned to contractors for correction of warranted defects is borne by the contractor. The board reasoned that returning defective goods under the warranty clause is tantamount to a revocation of acceptance, which shifts the risk of loss back to the contractor. Finally, in cost-type contracts, the government must ensure that contractors do not indirectly charge the costs of correcting defects to the contracts as reimbursable expenses.

The second remedy allows the government to take the corrective action and to assess the contractor for the reasonable costs.[182] The legislative history expresses Congress's intention to allow the government to demand less than the full amount of the incurred costs when assessment of the full costs would be inequitable.[183]

Frequently, these two remedies are neither practicable nor efficient, such as when the item is not capable of repair. A missile that has been expended and a satellite that cannot be recovered or repaired are examples of situations where a third remedy is necessary. Moreover, in some circumstances the government may decide that it can tolerate the defect. In these cases, the government has not received the full benefit of the contract; thus, a downward adjustment of the contract price is the most appropriate remedy.

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[180]Ideally, the contractor should bear the full costs of transporting a defective item to and from the repair point. In most current weapon systems contracts, however, the government bears the cost of transporting to the repair facility, and the contractor pays to return the item from the contractor's facility to the depot. Moreover, Army policy is that transportation expenses of the government will be recovered only when such expenses exceed the Army's normal repair facility destination cost for the item. AR **700-139,** para. **4-5a.**

[181]**ASBCA Nos. 19906, 19907, 76-2** BCA ¶ **12,016,** at **57,642.**

[182]Labor expenses will be computed using the Army's maintenance allocation charts (MAC) or the contractor's customary flat labor rates. AR **700-139,** para. 4-5.

[183]*See* Senate Rep., *supra* note **99,** at **246.**

This adjustment is determined by comparing the value of what the government bargained for with the value of what it received.[184] Quantifying the adjustment is seldom easy. The additional cost that the contractor would have incurred to produce the item without the defect is not an appropriate measure of the extent of the downward adjustment.[185] Instead, the government must determine how serious the defect is to the proper use and effectiveness of the weapon system. Ascertaining such reduced value rarely lends itself to mathematical precision and often involves judgmental elements.[186] The government's cost to correct the defects is a permissible measure in absence of a more precise one.[187] Finally, recovery of the entire price of the item is proper if the defective item is useless to the government.[188] Without some expressed standards set forth in the contract to measure the reduced value, this issue will probably be contested as frequently as it arises.

A fourth remedy should be considered—allowing the government to terminate for default and recover excess reprocurement costs. If the warranty does not expressly provide this remedy, the government probably may not seek this remedy.[189] *Ganary Brothers*[190] concerned a contract in which the warranty did not expressly include the remedy of default termination and the recoupment of excess reprocurement costs. The Armed Services Board of Contract Appeals held that when the contractor refused to replace or correct the defective items within a reasonable time after notice of the breach and the government did not retain the items, the appropriate remedy was recovery of the purchase price paid for the items.[191] The board did

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[184] *E.g.*, Henry Angelo & Co., ASBCA No. 30502, 87-1 BCA ¶ 19,619, at 99,248; Aero Prods. Research, Inc., ASBCA No. 25956, 87-1 BCA ¶ 19,425, at 98,216.

[185] Aero Prods Research, Inc, 87-1 BCA at 98,216. This is, however, the typical measure under the changes clause.

[186] *Id.*

[187] *Id.*; ***see*** *also* Henry Angelo & Co., 87-1 BCA at 99,248.

[188] *E.g.*, Council Mfg. Co., ASBCA No. 14232, 71-1 BCA ¶ 8731, at 40,549; Mercury Chem. Co., ASBCA No. 12554, 69-1 BCA ¶ 7730, at 35,912; Atlantic Hardware & Supply Corp., ASBCA No. 10450, 66-1 BCA ¶ 5378, at 25,241 (less the residual salvage value).

[189] *See* Henry B. Katz Industries, Inc., ASBCA No. 10026, 66-1 BCA ¶ 5629, at 26,291; Market Equip., Ltd., ASBCA No. 9639, 65-1 BCA ¶ 4608, at 22,007; Astubeco, Inc., ASBCA Nos. 8727, 9084, 1963 BCA ¶ 3941, at 19,518; Ganary Bros., ASBCA No. 7779, 1963 BCA 13721, at 18,610, ***aff'd on reconsideration,*** 1963 BCA ¶ 3875. All of these cases had a warranty clause that expressly stated that the specified remedies were exclusive. ***But see*** Manual Perry, Jr., ASBCA No. 4867, 58-2 BCA ¶ 1909, at 7730-31.

[190] *Supra* note 189.

[191] Ganary Bros., 1963 BCA, at 18,610. *Compare* ***id. with*** Auto-Skate Co., ASBCA No. 14716, 72-1 BCA ¶ 9201, at 42,691 (contracting officer may not return defective item and recoup contract price unless items are worthless to the government; instead, an equitable adjustment is appropriate).

not allow the recovery of excess reprocurement costs. Accordingly, the prudent contracting officer will ensure that each warranty expressly includes this remedy.

Except for traditional pass-through warranty items such as tires and batteries,[192] pass-through warranties, which require the government to seek remedies from subcontractors instead of prime contractors, may not be used in Army weapon system contracts.[193]

Finally, the warranty clause should explicitly state that the rights and remedies under the warranty clause are in addition to any other rights and remedies under any other contract clauses. For example, the rights under the inspection clause[194] for latent defects, fraud, or gross mistakes amounting to fraud will survive after the warranty has expired.[195] Additionally, it should state that the warranty terms are not affected by any terms or conditions of the contract concerning the conclusiveness of inspection and acceptance.[196] Otherwise, the warranty rights will be extinguished upon acceptance,[197] rendering the warranty worthless.

V. PROOF OF WARRANTY CLAIM

Because breach of warranty is an affirmative defense, to prove a breach of warranty the government must prove by a preponderance of the evidence:

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[192] AR 700-139, para. 4-8e.

[193] *Id.*

[194] FAR 52.246-02, INSPECTION OF SUPPLIES–FIXED PRICE (Jul 1985).

[195] *E.g.*, Charles G. Williams Constr., Inc., ASBCA No. 24967, 81-1 BCA ¶ 14,893, at 73,685; Baifield Indus., Division of A-T-0, Inc., ASBCA Nos. 14582, 14583, 72-2 BCA ¶ 9676, at 45,191; Keco Indus., Inc., ASBCA No. 13271, 71-1 BCA ¶ 8727, at 40,539 (defects covered by warranty were not discovered until after expiration of warranty, but contractor's liability under inspection clause survived warranty expiration); F.W. Lang Co., ASBCA No. 2677, 57-1 BCA ¶ 1334, at 4266 (one year warranty limitation did not preclude remedies under inspection clause for latent defects discovered after one year).

[196] *See* FAR 46.705(b) & (c). If the warranty clause provides that the warranty is not affected by conclusiveness of inspection and acceptance, the warranty will be unaffected by acceptance. *See, e.g.*, Airport Constr. & Materials, Inc., ASBCA No. 34909, 88-1 BCA 120,401; Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612; Abney Constr. Co., *supra* note 32; Florida Gen. Elecs., Inc., ASBCA No. 22391, 79-2 BCA ¶ 14,053, mot. *for reconsideration denied,* 79-2 BCA ¶ 14,148; Dunrite Tool & Die, Ltd., ASBCA No. 19416, 75-1 BCA ¶ 11,072; Wisconsin Mach. Corp., ASBCA No. 18500, 74-1 BCA ¶ 10,397; Bromfield, ASBCA No. 16968, 73-2 BCA ¶ 10,357; Cottman Mechanical Contractors, Inc., ASBCA No. 11387, 67-1 BCA ¶ 6566; Oxygen Equip. & Serv. Co., ASBCA No. 10137, 65-2 BCA ¶ 4870; McGrath and Co., ASBCA No. 1949, 58-1 BCA ¶ 1599.

[197] Instruments for Indus., Inc. v. United States, 496 F.2d 1157 (2d Cir. 1974).

1) the existence of a defect;[198]
2) that the most probable cause of the defect resulted from a warranted cause;[199]
3) that the defect existed during the warranted period;[200]
4) that the government provided the requisite notice of the defect to the contractor;[201] and
5) the resulting quantum due the government because of the warranty breach.[202]

Once the government establishes a prima facie case, the burden shifts to the contractor to refute the government's proof by a preponderance of the evidence.[203]

To prove the second element, the government must prove more than the existence of a failure during the warranted period.[204] Although the government need not precisely identify the cause of the defect, it must prove that the most probable cause resulted from a warranted cause.[205] If the contractor shows that it is just as plausible that the defect resulted from an unwarranted cause, the government has not satisfied its burden of proof.[206]

The legal enforceability of the warranty is quite perplexing when the government is the source of the weapon system's design, which the contractor must follow. The Armed Services Board of Contract Appeals has held that when the government provides the design, the government also implicitly warrants that a satisfactory product

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[198] *E.g.*, Aero Prods. Research, Inc., ASBCA No. **25956, 87-1** BCA ¶ **19,425,** at **98,213-14;** Phoenix Steel Container Co., ASBCA No. **9987, 66-2** BCA ¶ **5814,** at **27,037.**

[199] *E.g.*, cases cited *supra* note **32.**

[200] *E.g.*, Aero Prods. Research, Inc., **87-1** BCA at **98,214;** Araco Co., VACAB No. **532, 67-2** BCA **16440,** at **29,857.**

[201] *E.g.*, Aero Prods. Research, Inc., **87-1** BCA at **98,214;** J.R. Simplot Co., ASBCA No. 3952, 59-1 BCA ¶ **2112,** at **9073;** see *also supra* notes **166 & 167** and accompanying text.

[202] *E.g.*, Aero Prods. Research, Inc., **87-1** BCA at **98,213.**

[203] *E.g.*, Great Valley Constr. Co., ASBCA No. **24449, 81-2** BCA ¶ **15,308,** at **75,801;** George E. Jenson Contractor, Inc., ASBCA No. **23284, 81-2** BCA ¶ **15,207,** at **75,296.**

[204] *E.g.*, Ed Dickson Contracting Co., ASBCA No. **27285, 84-1** BCA ¶ **16,950,** at **84,311;** Triangle Painting Co., ASBCA No. **23643, 80-1** BCA ¶ **14,434,** at **71,162;** S & E Contractors, Inc., ASBCA No. **11044, 67-1** BCA **16175,** at **28,611.**

[205] *E.g.*, cases cited supra note **32.**

[206] *E.g.*, Abney Constr. Co., ASBCA No. **23686, 80-2** BCA ¶ **14,506,** at **71,514;** S & E Contractors, Inc., **67-1** BCA at **28,611;** Drake Am. Corp., ASBCA No. **4914, 60-2** BCA ¶ **2810,** at **14,507.**

will result if the design is followed.[207] The contractor may recover, under the changes clause,[208] any additional costs necessary to meet the essential performance requirements due to design shortcoming. This has been true even when the contract required the contractor to meet specified performance requirements.[210] The board has held, however, that if the contractor knew or should have known of the defective government design but did not bring it to the attention of the government before bidding, the contractor will not be excused from meeting the performance requirements.[211]

None of the above cases dealt with weapon system warranties. As the Board has never wrestled with this concern in regard to statutorily mandated weapon system warranties,[212] it is unclear whether this line of cases will be followed. The board probably will depart from these cases because Congress's intent was to shift the design risk to the contractor. On at least two occasions, the Armed Services Board of Contract Appeals has indicated that the contractor assumes the risk of the defective specifications when the contract explicitly shifts this risk to the contractor.[213]

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[207] *E.g.*, Argo Technology, Inc., ASBCA No. **30522, 88-1** BCA **120,381,** at **103,063;** Parsons of Cal., ASBCA No. 20867, 82-1 BCA ¶ **15,659,** at **77,404;** Radionics Inc., ASBCA No. **22727, 81-1** BCA ¶ **15,011,** at **74,276;** R.C. Hedreen Co., ASBCA No. **20599, 77-1** BCA ¶ **12,328,** at **59,544;** Seven Sciences, Inc., ASBCA No. **21079, 77-2** BCA ¶ **12,730,** at **61,877;** Datametrics, Inc., ASBCA No. **16086, 74-2** BCA ¶ **10,742,** at **51,101;** Consolidated Diesel Elec. Corp., ASBCA No. **10486, 67-2** BCA ¶ **6669,** at **30,951.** Federal courts have also held such. *See, e.g.*, United States v. Spearin, **248** U.S. **132, 136 (1918);** J.D. Hedin Constr. Co. v. United States, **347** F.2d **235, 241** (Ct. Cl. **1965);** Laburnum Constr. Corp. v. United States, **325** F.2d **451, 457** (Ct. Cl. **1963).** None of these cases involve weapon systems warranties. Whether these tribunals will deviate from these decisions when considering statutory weapon systems warranties is unclear. *See generally* Harrington, Thum & Clark, *The Owner's Warranty of the Plans and Specifications for a Construction Project,* **14** Pub. Cont. L.J. **240 (1984);** Mandel, *The Scope and Limitations of the Implied Warranty on Federal Government Design Specifications,* **6** Pepperdine L. Rev. **407 (1979);** Patten, *The Implied Warranty that Attaches to Government Furnished Design Specifications,* **31** Fed. B.J. **291 (1972).**

[208] FAR **52.243-1,** CHANGES--FIXED-PRICE (AUG **1987);** FAR **52.243-2** CHANGES--COST REIMBURSEMENT (AUG **1987).**

[209] *E.g.*, cases cited *supra* note **207.**

[210] *E.g.*, Radionics, Inc., **81-1** BCA at **74,276;** Datametrics, Inc., **74-2** BCA at **51,100-01;** Keco Indus, **Inc,** ASBCA Nos. 15184, 15547, **72-2** BCA **19576,** at **44,722,** *aff'd on reconsideration,* **72-2** BCA ¶ 9633; Linochine Prods. Corp., ASBCA **Nos. 11379, 13118, 70-2** BCA **18409,** at **39,133;** General Precision, Inc., ASBCA No. **12078, 70-1** BCA ¶ **8144,** at **37,845.**

[211] *E.g.*, Seven Sciences, Inc., **77-2** BCA at **61,876;** S.W. Elecs. and Mfg. Corp., ASBCA **Nos 20698 & 20860, 77-2** BCA ¶ **12,631,** at **61,219,** *affd on reconsideration, 77-2* BCA **12,785;** R.C. Hedreen Co., **77-1** BCA at **59,554;** Consolidated Diesel Elec. Corp., **67-2** BCA at **30,952.**

[212] *But cf.* LTV Electrosystems, Inc., ASBCA **No.** 13830, 70-2 BCA ¶ **8428** (non-statutory design warranty on an airborne battlefield illumination subsystem).

[213] **Radionics,** Inc., **88-1** BCA at **74,278;** PRB Uniforms, Inc., ASBCA Nos. **21504,21505,** 21506, 21743, 21957, 80-2 BCA ¶ **14,602,** at **71,995.** *See* also Rixon **Elecs.**, Inc. v. United States, **536** F.2d **1345, 1351** (Ct. Cl. **1976)** (government may disclaim any warranty by clear and unambiguous language).

If by conforming to the government-provided design the contractor is unable to meet the essential performance requirements, an obvious dilemma arises—by satisfying the design warranty, the contractor breaches the essential performance requirements warranty. In this situation the contractor might rightfully assert the legal defense of impossibility as an excuse for the breach. To resolve the dilemma and nullify any legal defense, the contract should explicitly state that the contractor is responsible for ensuring the design will fulfill the essential performance requirements.

The warranty clause should provide that if the contractor discovers that the design fails to fulfii the essential performance requirements, then the contractor must propose the minimum necessary changes to the design to meet those performance requirements. Of course, the contractor should bear the costs associated with the incorporation of these design changes. The contractor should be absolved of its warranty liability only if the government refuses to amend either the design specifications or the essential performance requirements.

The contractor who initially designed and tested the weapon system will normally be less concerned about its potential liability than will co-producers who were not involved in the full-scale development stages. Understandably, these co-producers are concerned that the essential performance requirements were never really validated or, more basically, that the design drawings were negligently or intentionally improperly prepared, for whatever reason.

Many contracting officers do not appreciate this concern. They believe that one service purchased by the government in the co-producer's contract is the co-producer's independent investigation of how well the weapon system's design meets the essential performance requirements. Although the co-producer is able to price the cost of this investigation in its proposal, the co-producer is unable to determine the costs to rectify any needed design changes until the investigation is conducted. Therefore, these costs cannot be accurately reflected in the co-producer's proposal. Alternately, to expect a co-producer to conduct this investigation prior to being awarded the contract is unconscionable. The investigation may require extensive and costly tests and evaluations, which the contractor would have to absorb as an expense in the preparation of its proposal.

Obviously, the solution is to delay negotiation of the warranty until the evaluation of the initial production quantity has been completed. Only then will all parties better understand the true risks

of the warranty. Unfortunately, this solution is normally not practicable.

Therefore, in cases where the contractor has no control over the design specifications, the government must either cautiously preserve its right to enforce the performance warranty or, in some manner, limit the contractor's liability under the performance warranty (if this is the preferred alternative). This same concern arises when the government specifies particular parts or sources of parts to be used by the contractor.[214]

VI. EFFECT OF CONTRACTOR MAINTENANCE ON MILITARY READINESS AND SUSTAINABILITY

The contracting officer must seriously consider the implications of the warranty's terms upon military readiness and sustainability.[215] Readiness is the capability during peacetime for the Armed Forces to perform their missions;[216] sustainability is the ability once hostilities have begun to continue combat missions until national security objectives are achieved.[217]

One of the predominant issues in this area concerns the maintenance and repair of equipment. Allowing the contractor to maintain and repair warranted items may result in an untenable position. Namely, when maintenance and repair responsibility passes to the government, no government employees will possess the expertise necessary to maintain and repair the weapons.

The ill effects of relying too heavily on contractors is exacerbated during wartime. The government must anticipate an inevitable increase in maintenance requirements during mobilization. Subse-

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[214] *See* S & E Contractors, Inc., 67-1 BCA at 28,611 (no performance specifications, however, were included in this contract). *Compare with* Wicks Eng'g & Constr. Co., IBCA No. 191, 61-1 BCA ¶ 2872, at 14,982 (government did not require specific source; contracting officer's representative (COR) merely requested contractor to use local Indian tribe's products insofar as possible), *mot. for reconsideration denied*, 61-1 BCA ¶ 2915.

[215] For a good discussion of this issue, see generally R. Cote, D. Basile, L. Griffin & L. Holcomb, The Implications of Warranties on Readiness and Mobilization (Mar. 1985) (unpublished paper available from the Industrial College of the Armed Forces) [hereinafter R. Cote].

[216] Army Reg. 700-138, Army Logistics Readiness and Sustainability 125 (Dec. 27, 1985).

[217] *Id.* at 126.

quently, during combat the heavy use of weapon systems will tremendously increase maintenance and repair requirements. Accordingly, the government must ensure that additional skilled personnel, repair equipment, and spare parts are available to support these heightened requirements. Because contractors during peacetime will not invest in these additional requirements at their own expense, the government must ensure through alternate planning that the capacity will exist to sustain combat operations.

VII. WARRANTY ADMINISTRATION PROGRAM

The efficacy of a warranty depends greatly upon the government's ability to enforce the warranty's provisions. Although a thorough discussion of the intricacies of a warranty administration program is beyond the scope of this article,[218] a cursory review of the main aspects of a warranty program will be discussed.

First, simplicity is the hallmark of an effective warranty administration program. Second, enforcing the warranty should require little additional effort by the users and must use a procedure that facilitates government-contractor interface. Third, the program must be compatible with the existing government support system.

In the Army, the materiel developer[219] of a weapon system is responsible for writing the Materiel Fielding Plan (MFP), which establishes the warranty administration program.[220] Warranty technical bulletins implement the plan's warranty provisions.[221] These bulletins define the users' responsibilities and the procedures for enforcing the warranty provisions.

To facilitate the identification of items covered by warranties, the Army requires that data plates be affixed to all warranted items that

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[218] For a detailed discussion, see generally AR 700-139; H. Balaban, K. Tom & G. Harrison, Jr., Warranty Handbook, ch. 6 (1986) (Defense Systems Management College text).

[219] The materiel developer (MATDEV) is the organization responsible for research, development, development tests, and product validation of an item. Army Reg. 310-25, Dictionary of United States Army Terms (Oct. 15, 1983).

[220] AR 700-139, para. 2-6g.

The MFP is a stand-alone document which consolidates all MATDEV and gaining user actions, schedules and procedures needed to process, deploy, and sustain a system. Detailed planning and actions required for deployment of a system are described in the MFP. U.S. Army Materiel Command Pamphlet 70-2, Materiel Acquisition Handbook, para. G.20 (Mar. 23, 1987).

[221] AR 700-139, paras. 4-12, 6-lb.

identify the items as warranted, the expiration date'of the warranties, and the appropriate warranty bulletin numbers.[222] Including the contract number is not mandatory, but this information probably would be helpful. These identification markings also are required on packaging material.[223] These markings alert the users to the warranties and where to find the procedures for enforcing the warranties. Contracting officers must ensure that the production contracts explicitly require the contractors to provide these markings.

To effectively administer the program, the government must have a system for tracking warranty claims. Within the Army, each major procurement command has a products assurance office that performs this function. Besides government tracking, the contractor should also be required to submit warranty status reports. The reports should contain the status by serial number of all items returned for warranty repairs, the time it took to repair the item, the costs incurred by the contractor for its warranty efforts, and any recommendations or comments to enhance the warranty's effectiveness.[224] Particular attention must be focused on identifying systemic defects.

Finally, the administration program must have a means to assess the effectiveness of the warranty and the administration of the warranty. In the Army, in-process assessments are required annually,[225] and a final payoff assessment must be conducted upon expiration of the warranty.[226] This assessment analyzes the economic benefits derived from the warranty in comparison to the costs of corrective actions had there not been a warranty.[227] It is imperative that the government use the results of these assessments to improve future procurements.

VIII. COST-EFFECTIVENESS METHODOLOGY

The contracting officer must perform a formal cost-benefit analysis before procuring any warranty.[228] The DFARS instructs that:

> In assessing the cost effectiveness of a proposed warranty, an analysis must be performed which considers both quantitative and qualitative costs and benefits of the war-

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[222] *Id.* para. 4-11. The markings must be in accordance with MIL-STD-130.
[223] *Id.* These markings must be in accordance with MIL-STD-129.
[224] The report should be prepared in accordance with DI-A-1025.
[225] AR 700-139, para. 4-4a.
[226] *Id.* para. 4-4c.
[227] *Id.*
[228] DFARS 246.770-8; AR 700-139, para. 4-3.

> ranty. Costs include the warranty acquisition, administration, enforcement and user costs, weapon system life costs with and without a warranty, and any costs resulting from limitations imposed by the warranty provisions. Costs incurred during development specifically for the purpose of reducing production warranty risks should also be considered. Similarly, the cost-benefit analysis must also consider logistical/operational benefits expected as a result of the warranty as well as the impact of the additional contractor motivation provided by the warranty. Where possible, a comparison should be made with the costs of obtaining, and enforcing similar warranties on similar systems.[229]

Quantifying all of these costs and benefits is a herculean and, at best, imprecise task. Most of the methods used in the Department of Defense concentrate on analyzing costs to the exclusion of benefits.

One common method is to compute what the government can expect to pay to repair the items if no warranty is provided.[230] The use of historical data to project the number of repairs and the costs of the repairs is necessary. If the warranty price coupled with the government's cost of administering the warranty is less than the government's projected costs, then cost effectiveness is obvious.

Another method is to determine the ratio of the warranty price to the production price. This ratio is compared to the warranty ratios in previous procurements of like or similar items. Although it is an imprecise analysis, it does provide some means of determining cost effectiveness.[231]

A third method of analysis is the cost-estimating relationships (CER) model. This model is predicated on the theory that quantifiable

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[229] DFARS 246.770-8. This analysis must be documented in the contract file. *Id.*

[230] This simple equation can be used:
X = meantime between failures (MTBF)
Y = usage hours
R = cost per unit to repair (includes administration and transportation costs)
Q = quantity purchased
G = government cost to repair in absence of warranty
G = (Q) (1 divided by X) (Y) (R)

[231] This assumes that the previous warranties were cost effective. Also, it does not account for the contractor's decreased risks resulting from experience the contractor obtained in previous procurements (i.e., learning curve). It is interesting to note that the warranty ratio has normally been in the range of 0-7% in contracts that I have reviewed.

variables exist that exert influence on the contractor's warranty costs. Historical data of these variables is used with a multiple regression technique to determine the relationship between the variable and the warranty's costs. Predictions are made using the historical data; predicted costs are then compared to the warranty's price.[232] A final method, bottom-up accounting, attempts to identify all of the contractor's costs of providing a warranty, including the costs of improving the weapon's reliability.[233] It requires extensive historical data as well as accurate projections. Because of its complexity, it is often impractical to use. The U.S. Army Aviation Systems Command has formulated a bottom-up model,[234] which is being used throughout the Department of the Army. It is a computerized model that computes the warranty's "should cost" and compares it to the cost to the government without a warranty. For further comparison, the model also allows the user to conduct a sensitivity analysis.

Although these models[235] quantify identifiable costs, they neglect benefits and disadvantages that are not easily quantifiable. The effects that a warranty will have on military readiness and sustainability,[236] competition,[237] spare parts breakout,[238] and the development or stifling of technological innovation[239] must also be considered when determining cost effectiveness. Nonetheless, DOD is attempting to develop other estimating methods that will adequately consider these concerns.

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[232] For detailed information as to this analysis, see K. Tom, E. Ayers & H. Balaban, Analysis of Warranty Cost Methodologies (1985) (technical report prepared by ARINC Research Corp. for the U.S. Naval Materiel Command) [hereinafter K. Tom].

[233] *Id.* For general guidance on auditing and reviewing estimated and actual warranty costs of contractors, and on various methods of accounting for warranty costs, see Defense Contract Audit Agency Manual 7640.1, DCAA Contract Audit Manual, ¶ 7-1600 (July 1988).

[234] *See* US. Army Aviation Systems Command, Warranty Model User's Guide, Technical Report 85-F-6 (1985) (the model is referred to as the WARM). The Air Force also has a standard model. *See* D. Williams, PPAC Decision Support System User's Guide (1985) (technical report prepared by the Analytic Sciences Corp. for the US. Air Force Product Performance Agreement Center (PPAC)); B. Allen, Product Performance Agreement Decision Support Handbook (1985) (prepared by the Analytic Sciences Corp. for PPAC).

[235] For other methods of analysis, see J. DerStelt, The Feasibility of a Cost-Effectiveness Assessment of Weapon System Warranties: A Case Study of the F-16 Reliability Improvement Warranty (RIW) Program (Sep. 1986) (unpublished thesis available from the U.S. Air Force Institute of Technology); D. Kelleher & R. Mulcahy, An Approach to Warranty Cost Benefit Analysis (May 1987) (unpublished thesis available from the Industrial College of the Armed Forces). K. Tom, *supra* note 232; Air Force Product Performance Center, Cost-Benefit Analysis of Warranties (Jan. 31, 1986) (task force report).

[236] *See* R. Cote, *supra* note 215.

[237] *See supra* notes 72, 73 & 144 and accompanying text.

[238] *See supra* notes 21-23, 144 & 145 and accompanying text.

[239] *See supra* text concerning technological innovation at sec. IV.C.

The Navy takes a somewhat different approach to cost effectiveness. It attempts to get warranties at no additional cost. The Navy contends that it pays for a system's reliability in the development and production contracts. Thus, it is inappropriate to pay more to require a contractor to stand by its product through a warranty provision. The Navy deduces that tracking costs is therefore not appropriate.[240] Although the Navy correctly realizes that reliability should be built into a weapon system and that it should not merely be a consequence of a warranty, its logic is fallacious. The Navy fails to realize that had it not required a warranty, it would have paid less for development and production because the contractor would have been less concerned with reliability.

Another issue of concern is that the DFARS states that the acquisition cost of a warranty may be set forth in the production contract as part of the end item's price or as a separate contract line item.[241] In any event, to perform a cost-benefit analysis, the contractor's price for the warranty must be readily identifiable.

In sealed bidding,[242] the invitation for bids (IFB) should require prices for the end item with and without the warranty. Even when the IFB identifies the warranty price, there is cause for concern. Assume that the government receives the following bids:

Bid	*End Item w/o warranty*	*End Item w/warranty*	*(End Item)*	*(Warranty)*
1	$55	$60	($55)	($5)
2	59	61	(59)	(2)
3	53	62	(53)	(9)

If the government determines that the warranty offered by the bidder with the lowest overall price (Bidder 1)is not cost effective, what should the government do? Should the government seek a waiver of the warranty and buy the end item without warranty from Bidder 3, who has the lowest end item without-warranty price? Or should the government buy the end item with the warranty from

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[240] *The Department of Defense Appropriations for 1987: Hearings on DOD Appropriations for FY 1987 Before the Subcmm. on the Department of Defense of the House of Representatives Comm. on Appropriations,* 98th Cong., 2d Sess., pt. 4, at 224 (1986) (answer to question submitted to the Department of the Navy).

[241] DFARS 246.702(e).

[242] In sealed bidding, the award is made to the lowest priced, responsive, responsible bidder.

Bidder **2,** who offers a cost effective warranty but the highest end-item price and the second highest end-item-with-warranty price?[243]

Choosing the second alternative is illogical—why purchase the same thing (end item with warranty) for a higher total price just for the sake of saying that the warranty price has been determined to be cost effective? In reality, part of Bidder **2's** warranty costs may actually be concealed in the end item's price.

The most prudent course of action is the first course of action--do not buy the warranty. Instead, purchase the end item without the warranty from Bidder **3,** who offers the lowest price for the end item without the warranty.

To accomplish this result, the IFB should state that the government reserves the right to purchase the end item with or without the warranty. It is not clear whether the IFB must state the price differentials or evaluation factors the government will use to determine if the warranty is cost effective. In a pre-Competition in Contracting Act[244] decision, the Comptroller General ruled that these factors need not be disclosed. In that decision, the Comptroller General stated, however, that if the factors are available, they should be disclosed unless disclosure would cause competitive harm.[245]

As long as the contracting officer's determination of cost effectiveness is not arbitrary, capricious, or in bad faith, the contracting officer may choose whether to buy the item with or without the warrant ~The Comptroller General in ***Moore** Service, Inc.* stated:

> Requirements that contracts for public work be let to the lowest bidder are not violated when specifications are drawn

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[243]This situation was anticipated in **1986** by the U.S. Army Tank-Automotive Command when it prepared to issue an invitation for bids **(IFB)** for **M939** Series five ton tactical trucks. The U.S. Army Materiel Command waived the requirement to separately price the warranty in that procurement. The policy of the U.S. Army Materiel Command is to separately price warranties. See letter from AMC Assistant Deputy Chief of Staff for Procurement **Policy** and Analysis John R. Jury to Subordinate Commanders, subject: AMC Procurement Policy (Jan. **16, 1985).**

[244]Pub. **L. No. 98-369, §§ 2701-2753, 98** Stat. **1175-203 (1984).** Among other things, the Act requires that sealed bids shall be evaluated based solely on the factors specified in the solicitation. 10 U.S.C. § 2305(b)(1) (Supp. **V 1987).**

[245]*See* Moore Serv., Inc., Comp. Gen. Dec. **B-204704.2, 204704.3, 205374, 205374.2, 82-1** CPD ¶ **532,** at **6 (1982).**

[246]*See id.;* H.M. Byars Constr. Co., Comp. Gen. Dec. **B-181545, 74-2** CPD ¶ **233,** at **9 (1974);** Ms. Comp. Gen. Dec. **B-157227,** Aug. 18, **1965,** Unpub.; Ms. Comp. Gen. Dec. **B-148333,** Apr. **9,1962,** Unpub.; Ms. Comp. Gen. Dec. **B-146343,** Nov. **1,1961,** Unpub.

> for different work, bids sought on different bases, and a choice is not made by the contracting officials until after all bids are opened.
>
> Since all bidders were put on notice that the Army was considering alternative approaches, ... we fail to see how any bidder was competitively prejudiced by this method of procurement.[247]

The only limitation is that the government may not award to a bidder whose aggregate price for the items actually purchased is not the lowest.[248] Thus, in the illustration above, Bidder 2 may not be awarded the contract no matter which alternative is chosen.

This procedure will encourage bidders to allocate their costs accurately between the price of the end item with and without the warranty. It will discourage contractors from inflating the end item price (and deflating the warranty price); if the government chooses not to purchase the warranty, the contractor's end item price may not be competitive with the prices of the other bidders. On the other hand, inflating the warranty price (and deflating the end item price) may place the contractor in a further untenable position; it would receive an unprofitable contract if the government purchases the end item without the warranty.

As in sealed bidding, the government must also decide in negotiated procurements whether to purchase a warranty with the end item. Negotiated procurements are awarded frequently, however, on factors other than price or price related. Thus, the warranty's price is only one factor used in the evaluation and selection process. Often, it will be more advantageous for the government to award to a higher-price proposer as long as the warranty is cost effective.

Most contractors are reluctant to insist on stringent warranty clauses that are not cost effective for the government. An inability to provide a cost effective warranty on items in mature full-scale production casts grave doubts upon the reliability of the contractor's product. Because this information must be transmitted to Congress,[249] failing to provide a cost effective warranty may subject the procurement to congressional scrutiny, with a possible decision to cut the

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[247] Moore Serv., Inc., 82-1 CPD at 5 (citations omitted).
[248] *Id.* at 6; H.M. Byars Constr. Co., 74-2 CPD at 9.
[249] *See supra* notes 67-70 and accompanying text.

procurement's funding.[250] Accordingly, DOD will not summarily approve waivers but rather will require the contracting officer to tailor the warranty to make it cost effective, if possible.[251]

IX. OBSERVATIONS ON THE EFFECTIVENESS OF WEAPON SYSTEMS WARRANTIES

Despite DOD's long term experience with commercial warranties,[252] it is still too early to assess the true effect of mandatory weapon systems warranties.[253] The government has experienced both short-term benefits and disadvantages with these warranties. Although it is too early to determine the long-term impact that warranties will have on the government, the defense industry, and weapon systems procurements, reflection on the application of warranties in recent government contracts provides some helpful insight.

A. ESSENTIAL PERFORMANCE REQUIREMENTS

Although each of the Armed Services is doing a fairly good job of delineating the warranted essential performance requirements, there are two general shortcomings. First, too many contracts are using a shotgun approach--designating all operating and reliability characteristics embodied in any technical manual and drawing covering the weapon system as essential performance requirements. Although this approach ensures that all vital performance requirements are warranted, it is more comprehensive than the law requires and often results in more costly warranties. The second observation falls at the

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[250] Senator Andrews stated that one of the prime purposes of requiring warranties is so Congress will know what a weapon will really do before Congress appropriates money for full-scale production. *Department of Defense Appropriations, 1987: Hearings on DOD Appropriations* for *FY 87 Before the Subcmm. on Department of Defense of the Senate Comm. on Appropriations*, 99th Cong., 2d Sess., pt. 3, at 2 (1986).

[251] During 1985 DOD granted only one waiver. The Rapier missile was purchased under a prior Memorandum of Understanding with the United Kingdom that had not provided for warranties. In a random review by the General Accounting Office of 97 DOD contracts subject to the warranty requirement, it found that only two waivers had been approved. General Accounting Office, NSIAD-87-122 (July 21, 1987).

[252] For a good discussion of the use and effectiveness of commercial warranties by the Department of the Army, see generally C. Beeckler & H. Candy, Analysis of AMC's Use of Warranties (June 1975) (study prepared by the US. Army Procurement Research Office).

[253] The General Accounting Office has criticized DOD for not actively overseeing the individual services' administration of warranties. GAO has found that the services consequently have not yet established fully effective warranty systems, and, thus, DOD has little assurance that warranty benefits are being fully realized. *See* General Accounting Office, Report NSIAD-89-57 (Sept. 27, 1989).

other end of the spectrum--too few essential performance requirements are being warranted, or else they are not being defined with the necessary precision. In either case, the government's rights are being jeopardized, as the following illustration reveals.

In 1988 the Army discovered that the Hellfire missile system, which was in production, was failing to meet low-altitude flight characteristics under certain conditions. These missiles were being procured under a dual source arrangement--one contract was awarded to the contractor who had designed the missile, and the other was awarded to a contractor who had not participated in the missile's design but was merely following the government-provided design.

The former contractor had designed the missile to achieve the low-altitude performance characteristics. Unfortunately, when the design drawings were prepared, the design features needed to accomplish the low-altitude flight were inexplicably omitted from the drawings. Furthermore, though the contractors were required to warrant the design, the warranty, due to another oversight, failed to designate the low-altitude characteristics as essential performance requirements. It was estimated that the corrections necessary to achieve the low-altitude characteristics would be in excess of five million dollars. Had more attention been paid when designating the essential performance requirements, the government might have avoided these additional costs.[254]

B. WARRANTY DURATION

Many government contracts contain relatively short warranty durations, The following average durations are representative of recent contracts:

Blackhawk Helicopter (UH/EH-60A)	12 months
Bradley Infantry Fighting Vehicle (M2A2)	15-18 months
Stinger-POST Missile	36 months
Apache Helicopter (AH-64A)	24 months
Maverick Missile (AGM-65)	42-50 months
SSN 688 Class Submarine	8 months
Aegis Weapon System (MK7)	24 months
CG 47 Class Guided Missile Cruiser	12 months
F-16 Fighter Aircraft (airframe)	6 months

[254] The contractors agreed to make the necessary design changes for the production of future missiles at no additional cost to the government. The Army has yet, however, to correct the previously produced missiles.

Many of these periods are not adequate to assess whether the reliability and maintainability requirements are being met. Usually, short durations are a result of contractors' insistence and the government's determination to keep warranty costs low. The government needs to better determine the necessary minimum durations based on real world situations and should not set durations arbitrarily.

C. LIMITATION OF CONTRACTORS' MONETARY RISK

In an effort to keep warranty prices low, the government, by including limitation of liability clauses in warranties, is placing very little risk on contractors. These clauses cap the contractors' monetary liability for warranty defects. The following contracts demonstrate the extent of these caps.

Contract Year	*Weapon* **System**	*Contract* ***Price***	*Monetary Cap*
1986	Bradley IFV	$322M	$5.7M[255]
1987	Bradley IFV/CFV	277M	3.1M[256]
1988	SSN 688 Class Submarine	687M	3.4M[257]
1988	CG 47 Class Guided Missile Cruiser	870M	20M[258]

As is gleaned from the above contracts, the contractors' maximum liability was only between 0.4-3% of the contract prices. This hardly places a significant risk on contractors to give them an incentive to avoid warranty claims.

Another technique often used to keep warranty prices low is for the government to share a specified percentage of the warranty correction costs in addition to having a maximum liability cap. Although limiting a contractor's liability is an appropriate means of procuring a low-cost warranty, no matter which technique is chosen the government needs to ensure that it places substantial monetary risk on contractors.

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[255]Contract # DAAE07-86-C-AO47.
[256]Contract # DAAE07-87-C-A038.
[257]Contract # N00024-88-C-2195.
[258]Contract # N00024-88-C-2034.

D. REDESIGN REMEDY

When the services first began implementing the statutory warranty requirements, many warranties failed to provide a redesign remedy. Army regulations now require that every weapon system warranty include a redesign remedy.[259] Ideally, the sufficiency of a system's design to meet the essential performance requirements should be known before full-scale production begins, rendering a redesign remedy unnecessary. The frequent lack of adequate testing during the research and development of weapon systems, however, dictates that redesign remedies are vital.

The necessity of a redesign remedy is illustrated by problems that the Air Force is experiencing with its F-16 fighter aircraft. In 1988 the Air Force discovered cracks in the compressor blades of its F-16 jet engines.[260] Fortunately for the government, the engines were warranted. The Air Force contends that the warranty requires the contractor not only to repair the cracked engines, but also to redesign the compressor blades and, if necessary, the entire first stage compressor. The manufacturer of the engines, General Electric, seems to agree.[261] Although the outcome of the Air Force's attempt to enforce the warranty will not be known for some time, an initial assessment reveals that redesign remedies are beneficial and necessary.

E. COST-BENEFIT ANALYSIS

As previously discussed, conducting a cost-benefit analysis before procuring a warranty is extremely difficult.[262] The analysis is not as simple as comparing the price of the warranty to the costs the government would incur without it. Predictably, contracting officers are not performing comprehensive analyses. Although departmental policies require comprehensive cost-benefit analyses,[263] the government, quite frankly, has not provided contracting officers with the necessary cost-benefit analytical models. Instead, most contracting officers conduct very simplistic analyses using few variables. Often, the assumptions and variables used are arbitrary, inaccurate, or meaningless.

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[259] *See supra* note 174.

[260] The cracks were discovered on F-16 fighters containing the F110-GE-100 engine. This engine is also used on the Navy's F-14A Plus and F-16N fighters.

[261] General Electric has agreed to replace the compressor blades and to redesign and upgrade the engines if necessary. It has been estimated that the total cost to correct the problem may exceed $250 million. *See* Def. News, Feb. 20, 1989, at 3.

[262] *See supra* text at sec. VIII.

[263] *See supra* note 229 and accompanying text.

This problem is further compounded by the reluctance of contractors to identify the costs associated with their warranties—and contracting officers are not demanding this information. Consequently, many solicitations are allowing contractors to propose warranty costs as "not separately priced." Contracting officers often mistake an unpriced warranty as a warranty at no cost to the government. Accordingly, they believe this excuses them from conducting a cost-benefit analysis. Few warranties, if any, are truly without cost to the government. The mere inclusion of a warranty places some additional risk on a contractor that will be reflected in the total contract price. Moreover, most warranties require the government to expend some effort in administrating the warranty. Besides not accounting for these inherent costs to the government, the failure to identify the warranty's cost denies the government the necessary benchmark to use when attempting to perform the final payoff analysis.

E FINAL PAYOFF ASSESSMENT

The true effectiveness of a warranty is determined by the final payoff assessment. Most procurement commands are performing fairly cursory payoff analyses. The following payoff assessment performed by the U.S. Army 'Rink-Automotive Command for the failure-free warranty covering the transmission on the Bradley Fighting Vehicle[264] typifies this approach. That final payoff assessment merely compared the money recovered by the government from its warranty claims with the contract's warranty price. During the administration of the warranty, the government submitted one hundred claims against the contractor valued at $452,693.81. The contractor honored five of the claims and reimbursed the government in the amount of $82,810.70. The contractor denied the, remaining ninety-five claims.[265] Because the government initially paid $5,784,551 for the warranty, but only recovered $82,810.70, the government concluded that the warranty was not cost effective. The ultimate conclusion may be correct. The analysis failed, however, to consider the extent to which reliability may have been enhanced because of the warranty and other benefits attributed to the warranty.

The major problem within the Army is that no definitive guidance

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[264] The warranty and payoff analysis also included multiple launch rocket system (MLRS) vehicles procured under the same contract.

[265] The reasons the contractor dishonored the claims are: 4 (improper use), 18 (spares), 27 (warranty expired), and 46 (insufficient data). The denied claims totaled $369,883.11.

has been published to standardize the final payoff analysis.[266] Each procurement activity is left to decide how to conduct the assessment. Obviously, some are doing a better job than others, but the experiences and expertise are not being shared.

All of the services, nonetheless, recognize the deficiencies and limitations of their payoff assessments. Accordingly, they are attempting to devise standard methodologies that will account for all of the benefits and disadvantages of a warranty instead of just the readily identifiable costs. Because of the lack of all encompassing final payoff assessments, there is no definitive answer at this time as to the true effectiveness of weapon system warranties.[267] It is hoped that in the near future the services will devise payoff assessments that permit a clear and convincing answer to this question.

G. IDENTIFYING DEFECTS & ASSERTING CLAIMS

One prominent and positive consequence of the mandated use of warranties is that the services are doing a better job of asserting claims. The warranty effect has been twofold. First, the government no longer loses its rights as to patent defects that are not discovered during the acceptance inspection.[268] Contractors must now correct patent defects that are discovered by the users of the weapon systems after acceptance. This is more appropriate, as users are normally in the best position to discover defects. Second, DOD is now doing an excellent job of identifying, reporting, tracking, and seeking correction of defective items. Although contractors have always been responsible for correcting latent defects, government personnel, prior to mandatory warranties, too often failed to assert claims when such defects were discovered. Government maintenance personnel were not knowledgeable of the government's rights or how to preserve

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[266] AR 700-139, para. 4-4c merely states:

> The final payoff assessment will evaluate the economic benefits derived from the warranty in comparison to the cost of corrective actions if there were no warranty. Cost avoidance as well as Government cost to administer the warranty must be considered. Nonmonetary benefits will be summarized and inprocess assessments will be consolidated and summarized.

[267] For an excellent final payoff cost-effectiveness analysis of the manufacturing and workmanship warranty used for the procurement of the Spruance Class ships during the early 1970's, see J. Freihofer & D. Beach, The Warranty Guaranty Clause: An Analysis of its Use on the Spruance Class (DD-963) Shipbuilding Contract and Identification of Lessons Learned (Mar. 1983)(unpublished thesis available from the Naval Postgraduate School).

[268] The standard inspection clause provides that acceptance is conclusive as to patent defects with two exceptions. *See supra* notes 194-96 and accompanying text.

and to assert them. Also, there was no easy and efficient means to assert warranty claims. The widespread use of warranties has now forced DOD to streamline its warranty administration procedures. Consequently, rights that were previously ignored or unknowingly waived are now being diligently pursued.

One area that needs more emphasis, however, is the involvement of legal personnel in enforcing warranties. Too often, if the contractor initially disputes a warranty claim, the government fails to assert the claim further. Usually, this is because warranty administrators do not seek the assistance of government legal resources.

X. CONCLUSION

When it comes to weapon system warranties, government procurement personnel are divided into two camps: those who recognize the beneficial characteristics of warranties; and those who believe warranties are ineffective, time consuming, and wasteful. Nevertheless, Congress has mandated the use of warranties, and warranties appear to be here to stay.[269]

In the brief time since Congress mandated warranties, DOD has done an excellent job of implementing congressional intent. DOD must remain steadfast in its pursuit of making the most of warranties and reaping the benefits that warranties offer.

Unfortunately, a frequent theme sounded by government contracting personnel is that contractors' legal personnel are often more skilled and experienced with the use of warranties than are their government counterparts.[270] I hope that this article will be one step toward rectifying this perceived shortcoming.

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[269] At the time the author was writing this article, Congress was considering including in the 1990 Defense Authorization Act a provision requiring an extended warranty for the B-2 Stealth bomber. The initiator of the provision, Senator Carl Levin, stated that he expects Congress will require similar provisions in contracts for other weapons systems. Def. News, Sept, 11, 1989, at 1, 66.

[270] R. Kuenne, *supra* note 123, at V-7.

APPENDIX

WARRANTY CLAUSE
MULTIPLE LAUNCH ROCKET SYSTEM (MLRS)

1. DEFINITIONS.

a. "Acceptance," as used in this clause, means the execution of an official document (e.g., DD Form 250) by an authorized representative of the Government.

b. "Correction," as used in this clause, means the elimination of a defect by repair or replacement.

c. "Supplies," as used in this clause, means the end items furnished by the Contractor required under this contract. The word does not include "data."

d. "Defect," as used in this clause, means any condition or characteristic in any supplies or services furnished by the Contractor under the contract that is not in compliance with the requirements of this clause and Section E of this contract.

e. "Design and manufacturing requirements," as used in this clause, include measurements, tolerances, materials and finished product tests, as specifically defined in the following Engineering Release Records (ERR's) and approved ECP's listed in Attachment 3 of contract:

(1) Launcher, Rocket, Armored Vehicle Mounted; M270, ERR MI 123360, part number 13029700-210.

(2) PP/C Training: ERR N/A, part number 13288848.

(3) Rocket Pod; 298MM, M26, ERR MI 123370 part number 13027900.

(4) Rocket Pod Practice: EER MI 123668, part number 13031900.

f. "Essential performance requirements," as used in this clause, means the performance requirements specified in Section 3 of the Product Specifications and drawings listed on EER MI 123360 for the Launcher and EER 123370 for the M26 Rocket Pod, approved ECP's listed in Attachment 3 of the contract, and any amendments thereof.

g. "U.S. Army Fielding Team" - A team established by the fielding command to accomplish specified tasks in conjunction with fielding the weapon system using Army approved techniques.

h. Expected Failure Warranty - A warranty that provides coverage for failures beyond those that are "expected." A predictable number of failures can be expected to occur even when an item is operating within its designed reliability. Under this concept, the Government would be liable for the repair/replacement of those failures as they occur within that prediction and the Con-

tractor would be liable for correction of all failures above that number and all other defects except those defects explicitly excluded in this clause.

i. Warranty Administration Cost - The cost incurred by a Contractor in administration provisions of a warranty. It does not include the labor and parts costs for performing repairs/replacements.

j. Individual Item Coverage - Warranty coverage that requires individual warranty claim actions for each defect. These claim actions will only be made on a warranted item when the item or a component of that item is required to be sent to the intermediate general support or higher level maintenance facility for repair.

k. Systemic Defect Coverage - Warranty coverage that provides protection to the lowest level of impact or expense within the affected subsystem and requires a contract remedy that will cover all contract deliverables.

1. Failure - Breakage of a part, malfunction of a part, or damage to a part, which renders it unserviceable, or a condition which causes or would cause a warranted item to fail to meet any performance requirement. A failure is also a defect.

m. Warranty Periods. (a) Individual Item Coverage begins at DD 250 of each warranted item and ends 24 months following the acceptance (DD 250) of the warranted item or 12 months after handoff to the user, as verified by the applicable handoff document, whichever occurs first. (b) Systemic defect coverage begins at DD 250 of the first warranted item and ends 24 months following the date of the last warranted item accepted and includes all systemic failures/defects during this term.

2. SPECIFIC WARRANTIES.

a. Design/Manufacturing Warranty.

The Contractor warrants that, for the warranty period defined in 1.m above, all supplies furnished under this contract shall conform to the design and manufacturing requirements defined in Paragraph 1.e of this clause or any amendments to the contract.

b. Materials and Workmanship Warranty.

The Contractor warrants that all supplies furnished under this contract are, at the time of acceptance (DD 250) and shall be for the warranty period defined in 1.m above, free from all defects in materials and workmanship.

c. Performance Warranty.

(1) Launcher, PN 13029700-210.

The Contractor warrants that the Launcher(s) furnished under this contract conform to the essential performance requirements, as defined in 1.f in two stages as set forth below:

(a) STAGE 1 - ACCEPTANCE THROUGH HANDOFF TO THE USER.

(i) For the period from Government acceptance until the end item is handed off to the user, as verified by the applicable handoff document, the Contractor warrants that the Launcher(s) will conform to all essential performance requirements as defined in 1.f. While a RRAD, depot personnel shall notify the Contractor directly at the address stated in Paragraph 7 of suspected defects. A contractor representative shall verify the suspected defect prior to removal of any hardware from the launcher.

(ii) To insure prompt notification of the Contractor of possible damage incurred during shipment of the launcher to RRAD, the Government will conduct an incoming and cyclic inspection within 15 days of receipt in accordance with Attachment 2.

(iii) In the event that any manufacturing operations not required to be performed by the Contractor, such as painting, are performed by Government personnel, upon completion of such operation(s), the Government will perform cyclic inspection in accordance with Attachment 2 of this clause.

(iv) It is the Government's responsibility, before shipment from RRAD, to perform preshipment inspection per Attachment 2 to this clause to assure that the end item is operational. Appropriate certification of such inspection must be maintained with each launcher and must be available to the Contractor for verification upon delivery of the end item to the U.S. Army Fielding Team.

(b) STAGE 2 - AFTER HANDOFF TO THE USER.

For a period not to exceed 12 months after handoff to the user, but in any event not more than **24** months from acceptance (DD 250 of each warranted item), the Contractor warrants that the items delineated in Attachment 1 to this clause will conform to all the essential performance requirements as defined in 1.f. Conformance to essential performance requirements is verified using technical manuals referred to in Attachment 1. The warranty provided under STAGE **2** is an expected failure warranty,

as defined above. Individual Item Coverage is invoked as follows: In the event of a failure of a warranted item as defined above, a warranty claim will be filed. MICOM will process the claims and the Government will be liable for the cost of repair or replacement of failures until there are 4 failures per launcher times the number of warranted launchers (e.g., 880 failures if 220 AVMRLs are warranted). The Contractor will be liable for the cost of repair/replacement of all defects except the expected failures until the end of the warranty. See paragraph E-3 of the contract on reduction of the total number of failures in the event warranted launchers are placed in long term storage during the warranty period.

(2) Rocket Pod. PN 13207900.

The Contractor warrants that the rocket pods furnished under this contract conform to the essential performance requirements as defined in 1.f above. There is no individual coverage for the rocket pods. The systemic defect coverage is for 24 months after the last rocket pod is accepted.

d. Systemic Defect Coverage applies to Design/Manufacturing Warranty, Materials and Workmanship Warranty, and Performance Warranty. When the Government determines that a systemic defect may exist, the Government will conduct a failure analysis at Government expense to determine if systemic contract remedies should be initiated. The Contractor is liable for cost of corrective action when systemic contract remedies are initiated. The term of this systemic defect coverage is as defined in 1.m above. The Contracting Officer, using the contract remedies, will arrange with the Contractor for an inventory-wide or total asset remedy when applicable. When systemic defect coverage is invoked the Contractor will prepare a corrective action plan in accordance with DI-RELI-80254. This remedy includes redesign if required to meet warranty requirements.

e. ALL IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND "FITNESS FOR A PARTICULAR PURPOSE," are excluded from any obligation contained in the contract. The Contractor shall not be liable for any loss, damage, or injury to any employee or agent of the Government or to any third party, or for any incidental or consequential damages.

f. Contractor corrected or replaced supplies or parts shall be warranted to the end of the original warranty period

stated in the ''warranty requirements" paragraph above.

3. REMEDIES AVAILABLE TO THE GOVERNMENT.

a. The Contractor's warranties under this clause shall apply only to those defects discovered during the period specified in Paragraph 1.m above.

b. If the Government determines that a warranted defect exists in any of the supplies or services accepted by the Government under this contract, the Government may, at no increase in contract price, (1) require the Contractor, at Contractor's plant, to repair or replace, at the Contractor's election, defective or nonconforming supplies; or (2) require the Contractor to furnish, at the Contractor's plant, the materials or parts and installation instructions required to successfully accomplish the correction; or **(3)** if mutually agreed in accordance with Paragraph 7.b to repair at a site other than Contractor's facility.

c. Defects in Material, Workmanship or Design/Manufacturing.

(1) The Contracting Officer shall promptly notify the Contractor of the defect, in writing, within 90 days of discovery of the defect.

(2) Upon timely notification of the existence of a defect in accepted supplies, the Contractor shall submit to the Contracting Officer, in writing, within 30 days, a recommendation for corrective actions, together with supporting information in sufficient detail for the Contracting Officer to determine what corrective action, if any, shall be undertaken.

(3) Not later than 15 days after receipt of the recommendation for corrective action, the Contracting Officer shall, in writing, direct correction or replacement.

(4) The Contractor, notwithstanding any disagreement regarding the existence of, or responsibility for a defect, shall promptly comply with any timely written direction from the Contracting Officer to correct or partially correct a defect, at no increase in the contract price. If it is later determined that an alleged defect is not a defect subject to this warranty clause, the contract price will be equitably adjusted.

d. Failure Under Performance Warranty.

(1) The Contracting Officer will promptly notify the Contractor of any defect.

(2) For all warranted defects which exceed expected failure numbers in Paragraph 2.c(1), the Contracting Officer will submit to the Contractor a warranty claim, and the Contractor shall submit to the Contracting Officer a recommendation for disposition/correction together with supporting information within **30** days.

(3) Warranted supplies which are returned will be inspected upon receipt at the Contractor's/Subcontractor's plant. Contractor/Subcontractor and Government representatives will review the condition of said supplies to determine any warranty coverage.

(4) If the representatives agree as to warranty coverage in whole or in part, they shall record their position in suitable documentation and proceed to effect repair.

(5) Failure to agree shall be jointly referred to the Contracting Officer for resolution.

(6) The Contractor, notwithstanding any disagreement regarding the existence of, or responsibility for a defect, shall promptly comply with written direction from the Contracting Officer after the joint referral in **(3)** above. If it is later determined that an alleged defect is not a defect subject to this warranty clause, the contract price will be equitably adjusted.

e. In the event of timely notice by the Contracting Officer of a decision not to correct or only to partially correct, the Contractor shall submit a technical and cost proposal within 90 days to amend the contract to reflect a downward equitable adjustment in the contract price which shall promptly be negotiated, in good faith, by the parties and be reflected in a supplemental agreement to this contract.

f. The rights and remedies of the Government provided in this clause:

(1) shall not be affected in any way by any terms or conditions of this contract concerning the conclusiveness of inspection and acceptance; and

(2) shall survive final payment.

(3) are in addition to, are not limited by, and do not limit any rights and remedies afforded to the Government by any other clause of this contract.

g. This warranty will not, in any way, be voided by any

Government performed repair, accomplished IAW standard Military Service Maintenance procedures, of any item, or component thereof covered by the warranties. The Government performed repairs may include the substitution of parts or components procured by the Government from another source, however, such substituted part or component and any resulting damage caused by failure of the substituted part or component are not the responsibility of the Contractor.

4. TRANSPORTATION COSTS.

a. When failed warranted items are to be returned to the Contractor they shall be transported to the Contractor's plant at Government expense via Government Bill of Lading unless agreed otherwise in accordance with the terms of this warranty.

b. All corrected warranted items shall be returned by the Contractor to Red River Army Depot at Contractor's expense.

5. REPORTS.

a. The Contractor shall prepare and furnish to the Government data required to implement and administer the provisions of this clause. The Contractor shall prepare a warranty status report in accordance with DI-A-1025.

b. The Government shall forward to the Contractor a properly completed warranty claim action (DA Form 2407, SF 368, or other applicable documents) for each suspected failure along with supporting data to determine the failure mode.

6. MARKINGS.

a. Warranted items delivered under this contract shall be stamped or marked in accordance with MIL STD-129 and MIL STD-130.

b. Marking shall be as follows:

(1) A warranty identification label or plate shall be securely applied, fastened, or attached to each LRU of the warranted item in a conspicuous location.

(2) The Contractor shall submit a warranty label or plate identification to be used on the warranted item(s).

(3) The warranty label or plate identification shall be of an alternating blue and white diagonal stripe background color.

(4) The plate or label shall have imprinted the following data:

(a) Warranty: The word warranty shall be in pre-

dominate bold letters.

(b) NSN: National Stock Number shall be imprinted.

(c) TB: TB shall identify the applicable technical bulletin for warranted item. TB number will be provided by the Government.

(d) EXP: EXP shall indicate the date of warranty expiration by month/date/year, i.e., **12/15/86.**

(e) FSCM: The Federal Supply Code for Manufacturer (FSCM) shall be indicated, i.e., 96906.

c. At acceptance a warranty label reflecting a warranty expiration date of **24** months shall be applied by the Contractor. Upon delivery of launchers to the U.S. Army Fielding Team, the Government will request replacement warranty labels from the Contractor. The Contractor shall then furnish labels with an expiration date of **12** months from handoff or **24** months from acceptance, whichever is earlier. In the event the Government does not notify the Contractor or fielding, the warranty shall extend no more than **12** months from delivery to the U.S. Army Fielding Team.

7. REPAIR POINT.

a. The parties agree that, for purposes of this warranty, the normal repair point shall be:

LTV Aerospace and Defense Company
LTV Missiles and Electronics Group
Highland Industrial Park
Camden, Arkansas

b. Warranted supplies may be repaired at another location if mutually agreed between the Government and the Contractor.

c. Contractor, upon receipt of Contracting Officer direction under Paragraph **3** above, shall provide all material, labor, facilities, tools, etc., needed to effect repair and shall commence to repair/replace such supplies. Repair/replacement shall be accomplished within an average of 60 days of receipt of defective items at the repair point.

d. At Government direction, the Contractor may utilize Government stocks to effect repair. At the Contractor's election, the Contractor may: **(1)** replace stocks used (with new, rebuilt, or serviceable parts of like value) within normal production lead-times; or **(2)** reimburse Government for said items at a negotiated price.

e. In the event the Contractor is unable to effect repair because the manufacturer of an item has discontinued operation, the Government may agree to allow the Contractor to return the

item to a U.S. Army repair facility and to reimburse the Government for repair effort at a negotiated price.

f. At its option, the Government may furnish a supply of circuit cards for the Contractor's use in a rotatable pool to expedite repair time on electronic parts. At any time the Government may, at its option, withdraw all circuit cards to Government stores. The Contractor agrees that it would not be entitled to any contract adjustment in the event the Government withdraws any of the circuit cards.

8. EXCLUSIONS.

a. The provisions of this warranty shall not apply to warranted supplies if failure has been caused by:
   (1) improper installation or maintenance by the Government not in accordance with Technical Manuals;
   (2) operation contrary to the Technical Manuals or other written instructions provided to and approved by the Government not in accordance with Technical Manuals;
   (3) repair or alteration by the Government in such a way as to induce a failure;
   (4) misuse, neglect, or accident;
   (5) combat damage;
   (6) installation or operation by the Government in other than its intended use;.
   (7) acts of God, subversion, riots, vandalism, or sabotage, fire, explosion or damage induced by or originating from sources external to the warranted supplies;
   (8) damage attributable to improper packaging, crating, handling, or storage by the Government, to the extent of said damage; or
   (9) any other circumstance for which the Government may expressly assume the risk.

b. With respect to Government-furnished property, the Contractor's warranty shall extend only to its proper installation, unless the Contractor performs some modification or other work on the property, in which case the Contractor's warranty shall extend to the modification or other work.

c. In no event shall there be warranty coverage unless the Government has delivered the warranted item(s) to the Contractor's facility in Camden, Arkansas, not later than 90 days after the end of the warranty period unless otherwise agreed to in accordance with the terms of this warranty.

d. The Contractor shall not be obligated to pay removal, re-

assembly, or handling cost when it is necessary to remove the supplies to be inspected and/or returned to the Contractor for correction or replacement.

e. The Contractor shall not be obligated to correct or replace supplies if the facilities, tooling, or other equipment necessary to accomplish the correction or replacement have been deleted from the contract by action of the Government. In the event that correction or replacement has been directed, the Contractor shall promptly notify the Contracting Officer, in writing, of the nonavailability. The Government shall then be entitled to an equitable reduction in price.

9. PRICE OF WARRANTIES.

a. It is agreed that, with respect to the following contract line items, the amount indicated represents the portion of the contract price attributable to administration of warranties under this clause.

Contract Line Item(s)	Unit Price of All Warranties Under this Clause	Total Price of All Warranties Under this Clause

b. In the event any amendments or other changes to this contract affect Contractor's cost of warranty compliance, the contract price shall be equitably adjusted in accordance with the "Changes" clause of this contract.

VOLUNTARY INTOXICATION AS A CRIMINAL DEFENSE UNDER MILITARY LAW

by Major Eugene R. Milhizer*

I. INTRODUCTION

The substantial impact of alcohol and illegal drugs upon military society is undeniable. About one out of three Army soldiers who were tried by general or bad-conduct discharge special courts-martial have been convicted of crimes involving illegal drugs[1]. The Army has established special programs for preventing and treating,[2] reprimand-

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[1] From 1984-1987, the percentage of general courts-martial involving drug offenses ranged from 41 percent to 34 percent annually. During the same period, 37 percent to 25 percent of special courts-martial empowered to adjudge a bad-conduct discharge measured annually have involved drug offenses. Drug offenses also accounted for about 14 percent of the cases before other special and summary courts-martial and for about 15 percent of instances where nonjudicial punishment was imposed during the same period. Statistics provided by Clerk of Court, United States Army Court of Military Review. In addition, about 8,000 soldiers were administratively separated in both 1985 and 1986 for alcohol or drug related misconduct or abuse. Statistics taken from Report, DESPER-46-II, published monthly. These figures undoubtedly underestimate the scope of the drug and alcohol problem in the military, as many offenses and other misconduct caused by the use of intoxicants are not counted as a drug or alcohol offenses for statistical purposes.

[2] Army Reg. 600-85, Alcohol and Drug Prevention and Control Program (3 Dec. 1986) [hereinafter AR 600-85].

ing,[3] and administratively separating soldiers who abuse intoxicants. Alcohol has been deglamorized,[5] and military law enforcement has targeted drug offenses as a top priority.[6]

The military justice system has responded to the pervasive impact of alcohol and drugs in a variety of ways. This response, however, has sometimes seemed inconsistent[7] and motivated by practical con-

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[3]Army Reg. 190-5, Military Police--Motor Vehicle Traffic Supervision, para. 2-7 (6 July 1988) [hereinafter AR 190-5]. This subparagraph requires the issuance of an administrative general officer letter of reprimand to all active duty Army personnel for: (a) conviction of driving while intoxicated/drunk driving either on or off the installation; (b) refusal to take or failure to complete a lawfully requested test to measure blood alcohol content, either on or off the installation, when there is substantial evidence of drunk driving; and (c) driving or being in physical control of a motor vehicle on post when blood alcohol content is 0.10 percent or higher, irrespective of other charges, or off post when blood alcohol content is in violation of state laws, irrespective of other charges. In addition, commanders are required to review the service records of such personnel to determine if administrative reduction, a bar to reenlistment, or administrative discharge is warranted.

[4]Army Reg. 635-200, Enlisted Personnel—Personnel Separations, ch. 9 (Alcohol or Other Drug Abuse Rehabilitation Failure), and para. 14-12*c*(2) (abuse of illegal drugs is serious misconduct) (20 July 1984); Army Reg. 635-100, Officer Personnel—Personnel Separations (1 May 1989). Other regulatory options include administrative reduction, Army Reg. 600-20, Enlisted Personnel Management System, ch. 6 (Reductions in Grade) (20 July 1984), and bars to reenlistment, Army Reg. 601-280, Personnel Procurement—Total Army Retention Program, ch. 6 (Bar to Reenlistment Procedures) (20 July 1984).

[5]AR 600-85, para. 2-5; **see** *also* Army Reg. 215-2, The Management and Operation of Army Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities, ch. **4** (Alcoholic Beverages) (17 Nov. 1986).

[6]***See generally*** AR 600-85, ch. 2, sec. IV (Law Enforcement and Drug Suppression), and the authorities cited therein.

[7]For example, intoxication or the use of intoxicants under some circumstances constitutes a criminal offense under military law. ***See,*** *e.g.*, Uniform Code of Military Justice arts. 111 (drunken or reckless driving), 112 (drunk on duty), 112a (wrongful use, possession, etc., of controlled substances), and 134 (drunkenness; drinking liquor with a prisoner; drunk prisoner; drunkenness –incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug), 10 U.S.C. §§ 911, 912, 912a and 934 (1982) [hereinafter UCMJ], respectively; Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 19841, Part IV, paras. **35** (drunk or reckless driving), 36 (drunk on duty), 37 (wrongful use, possession, etc., or controlled substances), 73 (disorderly conduct, drunkenness), 74 (drinking liquor with prisoner), 75 (drunk prisoner), 76 (drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug); ***see*** *also* United States v. Bailey, 27 C.M.R. 169 (C.M.A. 1958) (evidence insufficient to prove drunk on station); United States v. Pratt, 34 C.M.R. 731 (C.G.B.R. 1963) (evidence sufficient to provide drunk on duty); United States v. McArdle, 27 C.M.R. 1006 (A.F.B.R. 1959) (evidence of drunkenness under circumstances sufficient to support a conviction for violating UCMJ art. 134, but not UCMJ art. 133); United States v. Elmore, 19 C.M.R. 545 (N.B.R. 1955) (evidence supports guilty plea for being drunk in a public place); United States v. Robitaille, 13 C.M.R. 439, 443 (A.B.R. 1953), ***pet. denied,*** 15 C.M.R. 431 (C.M.A. 1954) (evidence sufficient to prove drunk and disorderly conduct in a public place); United States v. York, 11 C.M.R. 422 (A.B.R. 1953) (evidence sufficient to prove being under the influence of alcohol while acting as a duty officer in violation of UCMJ art. 134); United States v. Johnson, 10 C.M.R. 513 (A.B.R. 1953) (evidence sufficient to prove drunk and disorderly in the command); United States

siderations rather than coherent theory.[8]

At the heart of this response is the military's application of the defense of ''voluntaryintoxication." In some respects, voluntary in-

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v. Norman, 9 C.M.R. 496 (A.B.R.), ***pet. denied,*** 10 C.M.R. 159 (C.M.A. 1953) (evidence sufficient to prove drunk in quarters and drunk in uniform in a public place); United States v. Neff, 9 C.M.R. 333 (A.B.R. 1953) (evidence sufficient to prove drunk in uniform in a public place); United States v. Roberts, 9 C.M.R. 278 (A.B.R.), ***pet. h i e d ,*** 9 C.M.R. 139 (C.M.A. 1953) (evidence sufficient to prove drunk on duty); United States v. Wahl, 5 C.M.R. 733,737 (A.F.B.R. 1952), ***pet. denied,*** 6 C.M.R. 130 (C.M.A. 1953) (evidence sufficient to prove drunk while a prisoner); United States v. York, 4 C.M.R. 292 (A.B.R. 1952) (evidence sufficient to prove drunk on duty); United States v. Whitman, 4 C.M.R. 291 (A.B.R. 1952) (accused providently plead guilty to being drunk in command and drunk in uniform in a public place); United States v. Sills, 3 C.M.R. 354 (A.B.R. 1952) (evidence sufficient to prove drunk on duty); United States v. Clarke, 3 C.M.R. 227, 229-30 (A.B.R. 1952) (evidence sufficient to prove drunk on duty but not conduct unbecoming an officer); United States v. McMurtry, 1 C.M.R. 715 (A.F.B.R. 1951) (drunkenness in a public place was service discrediting under the circumstances); United States v. McCreary, 1 C.M.R. 675 (A.F.B.R. 1951) (evidence sufficient to prove drunk on station); United States v. Dreschnack, 1 C.M.R. 193 (A.B.R. 1951) (evidence sufficient to prove drunk on duty); ***see generally*** W. Winthrop, Military Law and Precedents 292-93 (2d ed. 1920).

On the other hand, voluntary intoxication may act as a defense to certain crimes under military law. ***See*** MCM, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 916(1)(2); ***see*** *generally* W. Winthrop, *supra,* at 293. The application of voluntary intoxication as a failure of proof defense for particular offenses under military law will be discussed at *infra* notes 111-62 and accompanying text.

[8]For example, voluntary intoxication can reduce premeditated murder to unpremeditated murder, but it will not reduce murder to manslaughter or any other lesser offense. MCM, 1984, R.C.M. 916(1)(2) discussion, and Part IV, para. 43c(2)(c); ***see*** United States v. Ferguson, 38 C.M.R. 239 (C.M.A. 1968); United States v. Judkins, 34 C.M.R. 232 (C.M.A. 1964); United States v. Stokes, 19 C.M.R. 191 (C.M.A. 1955); United States v. Roman, 2 C.M.R. 150, 157-58 (C.M.A. 1952); United States v. Seeloff, 15 M.J. 978, 983 (A.C.M.R.), ***pet. denied,*** 17 M.J. 18 (C.M.A. 1983); United States v. Trower, 2 M.J. 492 (A.C.M.R. 1976); United States v. Jackson, 40 C.M.R. 355 (A.B.R. 1968). As will be discussed later, this result seems contrary to the ***Manual*** provision, which provides that voluntary intoxication will negate specific intent. ***See*** *infra* notes 199-247 and accompanying text. This exception for unpremeditated murder is no doubt partially result oriented, i.e., the military justice system is unwilling to let a murderer "escape" with a conviction for some lesser offense because of voluntary intoxication. Other problematic exceptions to the ***Manual's*** rule are discussed at ***infra*** notes 176-98 and accompanying text.

This judicial disinclination to apply the voluntary intoxication defense may be explained, in part, by the fact that those entitled to the defense voluntarily create the debilitating condition. This lack of sympathy for an accused who becomes voluntarily intoxicated is perhaps best illustrated by contrasting the favored status of those who become involuntarily intoxicated.

> [T]he defense of involuntary intoxication reflects the societal view that one should not be held criminally responsible for actions over which one has no rational control. Indeed, the involuntarily intoxicated defendant is usually a far more sympathetic figure . . . . [He] is the normally law-abiding, mentally balanced citizen who, through no fault of his or her own, has been rendered "temporarily insane" through the fraud, contrivance, duress, or mistake of another.

Kaczynski, ''*I Did What?" The Defense of Involuntary Intoxication*, The Army Lawyer, Apr. 1983, at 1, 2-3.

toxication under military law is a unique amalgam of theory and expediency. The defense has been shaped by both analytical principles and practical forces into a curious hybrid that sometimes diminishes but rarely precludes criminal culpability.[9]

Despite the importance and unique character of the voluntary intoxication defense in military practice, the subject has recently attracted little judicial[10] and virtually no scholarly attention![11] This lack of interest is probably a consequence of military trial practitioners—military judges, trial counsel, and trial defense counsel—having a shared understanding of the legal theory and application of voluntary intoxication defense and a mutual willingness to abide by that understanding.[12] This consensus has helped create an ethos where military trial participants rarely challenge the underlying principles of voluntary intoxication and instead typically contest factual questions pertaining to its application in a given case.[13]

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[9]MCM, 1984, R.C.M. 916(l)(2), provides:

Voluntary intoxication. Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

[10]Research in preparation of this article has revealed a marked decrease of reported cases addressing issues involving intoxication or drunkenness. The results of the research have been summarized in the following table.

REPORTED MILITARY CASES INVOLVING A SUBSTANTIAL INTOXICATION ISSUE

Volume Number	*Number of Reported Cases*
1 C.M.R. - 10 C.M.R.	54
11 C.M.R. - 20 C.M.R.	42
21 C.M.R. - 30 C.M.R.	27
31 C.M.R. - 40 C.M.R.	18
41 C.M.R. - 50 C.M.R.	6
1 M.J. - 10 M.J.	10
11 M.J. - 20 M.J.	8
20 M.J. - present	*3*

[11]No articles addressing voluntary intoxication and only one article concerning involuntary intoxication have been published in either the *Military Law Review* or *The Army Lawyer*. *See* Kaczynski, *supra* note 8.

[12]Criticism of military trial practitioners is not intended. Quite to the contrary, these observations concerning this "shared understanding" simply recognize that military law pertaining to voluntary intoxication is thought to be generally well settled and that trial practitioners usually operate within those defined limits. This article, however, seeks to re-examine some of the conventional wisdom concerning voluntary intoxication.

[13]Put another way, most trial litigation pertaining to voluntary intoxication focuses upon whether the accused was intoxicated and does not concern the legal effect of any such presumed intoxication.

This article will critically re-examine selected aspects of this shared understanding of voluntary intoxication. Specifically, some of the applications of the voluntary intoxication defense—or, more accurately, the failure to allow the defense for certain specific intent crimes such as unpremeditated murder, maiming, and indecent assault—will be criticized as being unsound or in need of reconsideration. In support of this thesis, the term "voluntary intoxication" will initially be dissected and its components—voluntariness and intoxication—will be defined and analyzed. An overview of criminal defenses will then be briefly set forth so that voluntary intoxication can be considered in a proper context. Next, the origins of voluntary intoxication as a failure of proof defense under military law will be examined. The proper application of the defense to crimes in the military justice system will also be reviewed. Finally, the failure to allow voluntary intoxication as a defense for selected specific intent crimes will be considered and, in some instances, criticized.

II. VOLUNTARY INTOXICATION DEFINED

The term "voluntary intoxication" combines two distinct concepts —"voluntariness" and "intoxication." Each component must be clearly defined in order to understand the meaning of the larger term.

A. VOLUNTARINESS

Civilian courts "generally have interpreted the voluntary intoxication requirement to mean that the intoxicant has been introduced into the actor's system with his knowledge and without force or fraud."[14] The Model Penal Code uses the term "self-induced" intoxication instead of "voluntary" intoxication and defines the term to mean "intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime."[15]

Accordingly, voluntary intoxication "is not limited to those instances in which drunkenness was definitely desired or intended but includes all instances of culpable intoxication."[16] Intoxication is,

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[14] 1 P. Robinson, Criminal Law Defenses 302-03 (1984).

[15] Model Penal Code § 2.08(5)(b) (proposed official draft 1962) [hereinafter Model Penal Code].

[16] R. Perkins, Criminal Law 1001 (1982) (footnote omitted). See *id.* at 1001-18 for a comprehensive discussion of voluntary intoxication under civilian law, from which much of the following discussion of voluntariness in this article is drawn.

therefore, deemed voluntary even though the drinking was induced by the persuasion or the example of another.[17] Moreover, merely because someone else provided the intoxicant does not necessarily render the resulting intoxication involuntary![*]

Civilian authorities have recognized a variety of circumstances in which intoxication is considered to be acquired involuntarily. These circumstances can be grouped into several distinct theories of involuntary intoxication. Under one theory, intoxication is deemed to be involuntary "if it is the result of a genuine mistake as to the nature or character of the liquor or drug . . . or if it has resulted from taking something not known to be capable of producing such a result, as through the fraud or contrivance of another."[19] Put another way, "intoxication is not voluntary if brought about by the fraud, artifice, or stratagem of another."[20]

For example, in *State v. Alie*[21] an innocent victim unknowingly consumed "knock-out" drops supplied by another to help facilitate a robbery. In *People v. Penman*[22] an innocent victim unknowingly consumed cocaine tablets provided by a friend, who described the tablets as being "breath perfumers." In each case, the victim later committed a homicide while under the influence of the drug that was previously taken. In both instances the court found that the victim would be innocent of homicide if the claimed facts were true, as the slayings would have occurred as a result of involuntary intoxication.[23]

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[17]Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931) (*see infra* notes 25-27 and accompanying text); Borland v. State, 158 Ark. 37, 249 S.W. 591 (1923) (drinking whiskey at the request of another does not make the drinking or drunkenness therefrom involuntary; one must be coerced to drink before his act or the effect can be classified involuntary); *see also* McCook v. State, 91 Ga. 740, 17 S.E. 1019 (1893) (if one or more persons give whiskey to another, "in a social way, and with no view or purpose at the time" to induce him to commit a crime, and afterwards procure him to commit a crime, he is responsible); R. Perkins, *supra* note 16.

[18]State v. Sopher, 70 Iowa 494, 30 N.W. 917 (1886) (intoxication voluntary even though liquor was furnished by, or at the request of, the deceased victim); R. Perkins, *supra* note 16; *see* Annotation. *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge*, 73 A.L.R.3d 195 (1976).

[19]1 P. Robinson, *supra* note 14, at 302 n.53; *accord* R. Perkins, *supra* note 16, at 1002.

[20]R. Perkins, *supra* note 16, at 1002.

[21]82 W.Va. 601, 96 S.E. 1011 (1918).

[22]271 Ill. 82, 110 N.E. 894 (1915).

[23]*See also* People v. Tidwell, 3 Cal.3d 82, 89 Cal. Rptr. 58, 473 P.2d 762 (1970) (the fact that drunkenness was by one quite unfamiliar with intoxicating liquor is entitled to consideration; court erred in failing to instruct that voluntary intoxication may have created a diminished capacity, which reduces murder to manslaughter); People v. Carlo, 46 A.D.2d 764, 361 N.Y.S.2d 168 (1974) (involuntary intoxication defense raised where the defendant claimed that he consumed an hallucinogenic drug, given to him by the complainant, which was said to be an aspirin or tranquilizer); Annotation, *supra* note 18, at 195.

The decisive factor under this theory of involuntary intoxication is whether the defendant became intoxicated because of an innocent mistake as to the nature of the substance consumed; the trickery employed upon the defendant is relevant only if it induced the innocent mistake.[24]

A second theory provides that intoxication is involuntary if one is forced or coerced to consume an intoxicant against his will.[25] This basis for concluding that such intoxication is involuntary is self-evident, as by its terms the theory contemplates duress or force that overcomes the actor's desire not to consume a known intoxicant.

In *Burrows v. State*[26] an eighteen- or nineteen-year-old boy, who had never tasted liquor before, claimed he was forced to drink several bottles of beer and some whiskey by a male traveling companion. The boy and man were driving across the desert and the boy, who was penniless, said he feared being forced from the car and abandoned if he refused to drink the liquor. The boy claimed that he later lost control and killed the man because of his involuntary intoxication. The court permitted the issue of involuntary intoxication to go to the jury, instructing that the defendant's intoxication would be considered involuntary if he had been compelled to drink against his will and consent. The jury ultimately found the intoxication was not involuntary and returned a verdict of guilty.[27]

A third theory holds that intoxication is involuntary if it is the result of a prescribed medicine.[28] The intoxication is deemed to be involuntary because a patient is entitled to assume that an intoxicating dose would not be prescribed by a physician.[29] This theory is available both where the doctor errs and where a proper dosage produces an unex-

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[24]*See* R. Perkins, *supra*, note 16, at 1002 (citing State v. Brown, 38 Kan. 390 (1988)). This theory of involuntary intoxication closely resembles the special defense of mistake of fact recognized under military law. ***See*** R.C.M. 916(j). For a recent discussion of the mistake of fact defense, see Note, ***Recent Applications of the Mistake of Fact Defense,*** The Army Lawyer, Feb. 1989, at 66.

[25]R. Perkins, *supra* note 16, at 1002-03; 1 P. Robinson, *supra* note 14, at 302 n.53 and 303 n.61.

[26]38 Ariz. 99, 297 P. 1029 (1931).

[27]Another case which discusses involuntary intoxication because of force or duress is Minneapolis **v.** Altimus, 306 Minn. 462, 238 N.W.2d 851 (1976) (dicta).

[28]R. Perkins, *supra* note 16, at 1003-04; 1 P. Robinson, *supra* note 14, at 302 n.53.

[29]"A patient is not bound to presume that a physician's prescription may produce a dangerous frenzy." Perkins v. United States, 228 F. 408, 415 (4th Cir. 1915). The court continued, however, that "a patient is bound to take notice of the warning on a prescription, and this obligation, of course, is stronger if he reads the prescription." *Id.*; ***see generally*** R. Perkins, *supra* note 16, at 1003; 1 P. Robinson, *supra* note 14, at 302 n.53.

pected result because of the patient's peculiar susceptibilities.[30] Presumably, intoxication would also be considered involuntary where a proper dosage was prescribed but the patient inadvertently and without fault exceeded the prescription.[31]

Several other theories of involuntary intoxication have been advanced by some courts and commentators. Under one of these theories, intoxication will be considered involuntary when the voluntary consumption of alcohol is combined with an aggravating event[32] or condition.[33] In order to be judged involuntary, the synergistic effect of the intoxicant and the other event or condition must either be unknown to the actor or beyond his control.[34]

Few reported military cases directly address the issue of voluntariness with respect to the defense of voluntary intoxication.[35] A similar absence of well-developed judicial guidance is found in civilian jurisprudence. As one commentator explained when discussing this issue, "[t]he difficulty in ascertaining the meaning of voluntary intoxication results from the failure of the courts to define the terms. . . . The chief judicial method of elucidating the meaning of voluntary has been by way of generalizing the exceptions from liability."[36]

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[30] Minneapolis v. Altimus, 306 Minn. 462, 238 N.W.2d 851 (1976) (involuntary intoxication defense raised where the defendant claimed his careless driving and hit-and-run accident was done under the influence of Valium prescribed for him at a Veterans Administration Hospital); R. Perkins, *supra* note 16, at 1003-04. Under these circumstances, the defense of involuntary intoxication would be analogous to the mistake of fact defense. See *supra* note 24.

[31] *See* People v. Koch, 250 App. Div. 623, 294 N.Y.S. 987 (1937); R. Perkins, *supra* note 16, at 1004.

[32] Peterson v. State, 586 P.2d 144, 152-54 (Wyo. 1978) (consumption of some liquor combined with repeated spraying of animal repellant); Leggett v. State, 21 Tex. App. 382, 17 S.W. 159 (1886) (consumption of some liquor combined with a blow to the head); *see also* United States v. Olvera, 8 C.M.R. 419 (A.B.R. 1953), *aff'd*, 15 C.M.R. 134 (C.M.A. 1954) (consumption of intoxicant combined with a blow to the head).

[33] Intoxication will be deemed involuntary "if one by reason of sickness or want of sleep is reduced to such a condition that a small quantity of stimulant which would ordinarily have no such effect causes intoxication." R. Perkins, *supra* note 16, at 1004 (citing Regina v. Mary R. (1887), *cited in* Kerr, Inebriety 395 (2d ed.), and in 1 Wharton & Stille, Medical Jurisprudence § 243, n.17 (5th ed. 1905)). Of course, if such a response could have been reasonably anticipated by the affected actor, the defense of involuntary intoxication should not apply. See *infra* note 48.

[34] *See* R. Perkins, *supra* note 16, at 1004 n.86; see *also supra* note 32 and the cases cited therein.

[35] Of course, a sparse number of reported military cases address the issue of voluntariness in connection with the defense of involuntary intoxication. See generally United States v. Ward, 14 M.J. 950 (A.C.M.R. 1982), *pet.* denied, 16 M.J. 94 (C.M.A. 1983); United States v. Schumacher, 11 M.J. 612 (A.C.M.R. 1981); United States v. Martin, 7 M.J. 613 (N.C.M.R. 1979); United States v. Craig, 3 C.M.R. 304 (A.B.R. 1952).

[36] J. Hall, General Principles of Criminal Law 538 (2d ed. 1960).

Besides being scarce, early military cases that discuss the issue of voluntariness as it relates to intoxication are not particularly helpful in explaining the term. For example, in *United States V. Dreschnack*[37] the board said merely that the government must prove the accused "indulged in the excessive use of alcohol and that such indulgence was voluntary."[38] The board failed, however, to define any of the quoted language, including what it meant by the term "voluntary."

In *United States V. McCreary*[39] the accused was convicted of being drunk on station. The reported facts show that the accused was picked up for being intoxicated in the civilian community and then was returned involuntarily by the military police to the Air Force base where he was assigned.[40] The board upheld the accused's conviction despite his having been "returned involuntarily to the base."[41] The board reasoned that the accused's intoxication was voluntary, that voluntary intoxication was the gravamen of the offense, and that the "place where it [the intoxication] occurred was wholly incidental."[42]

The correctness of the decision in *McCreary* turns on the board's finding that "general drunkenness is a military offense whenever and wherever it occurs."[43] If this premise is accurate, and if, as the board concluded, being drunk on station is a less severe offense than drunkenness in general,[44] then the accused's involuntary return to the base would be irrelevant to the issue of his guilt. Indeed, the accused's return to base under such circumstances would neither perfect the offense nor enhance its punishment; it would, in fact, arguably enure to the accused's benefit, as he would be exposed to punishment for a less severe offense.

The board's sweeping conclusion that drunkenness is per se unlawful is, however, inaccurate. To constitute a violation of military law, the accused's drunkenness must generally occur in one of three ways: while on duty; so that he is unable to perform duties; or in such a manner that his behavior constitutes service-discrediting con-

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[37] 1 C.M.R. 193 (A.B.R. 1951).
[38] *Id.* at 196.
[39] 1 C.M.R. 675 (A.F.B.R. 1951).
[40] *Id.* at 676.
[41] *Id.*
[42] *Id.* at 677.
[43] *Id.* at 676 (citing W. Winthrop, *supra* note 7, at 722-23).
[44] *McCreary*, 1 C.M.R. at 676.

duct.[45] Even for the latter circumstance, the drunkenness or disorderly conduct should be either public[46] or related to duty to be service-discrediting. Accordingly, if an accused becomes intoxicated under strictly private circumstances[47] while off duty, he would not be guilty of any offense recognized by military law. If, on the other hand, the accused knew or reasonably should have known that he would be required to perform duties or be exposed to public scrutiny under discrediting circumstances, his drunkenness would constitute a military offense even if he became intoxicated under private, off duty circumstances.[48]

The issue of voluntariness was directly addressed in *United States v. Craig*.[49] The accused claimed on appeal that he perpetrated the charged homicide after becoming involuntarily intoxicated.[50] Specifically, he contended that his intoxication, which caused the homicide, was involuntary because he was "induced" to drink sake.[51] The Army Board of Review apparently recognized in dicta the three principal theories of involuntary intoxication under civilian law, writing that intoxication would be deemed involuntary only where an accused "becomes drunk by being compelled to drink against his will, or through another's fraud or stratagem, or by taking liquor prescribed by a physician."[52] Finding that none of these triggering conditions was satisfied in *Craig*, the board rejected the accused's contention and affirmed his conviction.[53]

More recently, the Army Court of Military Review addressed the question of voluntariness with regard to intoxication in *United States v. Ward*.[54] The accused contended that his plea of guilty to unlawfully

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[45] *See* UCMJ art. 112 and MCM, 1984, Part IV, para. 36 (drunk on duty); UCMJ art. 134 and MCM, 1984, Part IV, para. 76 (incapacitation because of prior intoxication): and UCMJ art. 134 and MCM, 1984, Part IV, para. 73 (disorderly conduct; drunkenness), respectively.

[46] *Cf.* United States v. Hickson, 22 M.J. 146, 150 (C.M.A. 1986) and United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989) (fornication is not a military offense if strictly private).

[47] "Strictly private circumstances" imply, of course, that the service member is not on duty, his actions do not have a significant military nexus (e.g., while in uniform under such circumstances that any misconduct would typically be service discrediting), and they are not exposed to public scrutiny.

[48] *See* MCM, 1984, Part IV, para. 43c(3)(a) (permissible inference can be drawn that a person is responsible for the natural and probable consequences of his intentional acts); *see also* United States v. Varraso, 21 M.J. 129 (C.M.A. 1985), and United States v. Owens, 21 M.J. 117 (C.M.A. 1985) (permissive inference applied to homicide cases).

[49] 3 C.M.R. 304 (A.B.R. 1952).

[50] *Id.* at 311.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] 14 M.J. 950 (A.C.M.R. 1982), *pet. denied*, 16 M.J. 94 (C.M.A. 1983).

opening mail matter was improvident because he had become involuntarily intoxicated with phencyclidine (PCP). According to the accused, he intentionally smoked what he believed to be an unadulterated marijuana cigarette.[55] He later learned, however, that the cigarette had been laced with PCP.[56] The accused claimed that he engaged in the charged misconduct only because of the effects of the PCP and that he did not realize he had handled the mail until he saw the mail room in disarray the following day.[57]

The court rejected the accused's contention that his purported intoxication was involuntary.[58] The court reasoned that the accused's intentional use of one illegal and mind-altering drug rendered him culpable for the consequences of his unintentional use of a different mind-altering drug.[59] The court observed that, under different circumstances, intoxication could be deemed involuntary if "the substance adulterated with a dangerous drug is itself a legal consumable, and one which scarcely would be expected to have been altered."[60]

Referring to the broad rules of the military's mistake of fact defense[61] is useful in analyzing the issues raised in *Ward*. To be entitled to the mistake of fact defense, the accused's mistaken belief not only must negate the mental state required to establish an element of the charged offense, but also must generally be one which, if true, would be exonerating.[62] Thus, an accused's mistaken belief that the illegal drug he possessed was one other than the illegal drug

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[55] *Id.* at **951.**

[56] *Id.*

[57] *Id.*

[58] *Id.* at **954.**

[59] *Id.* at 953-54. The court noted that the frequent lacing of marijuana with PCP was a matter of common knowledge and thus foreseeable. *Id.* at **954.** The court, therefore, implied that the accused's voluntary use of marijuana under the circumstances also constituted a voluntary—if albeit constructive—use of PCP. If, on the other hand, legal alcohol had been unknowingly laced with PCP, any resulting intoxication because of the PCP would have been deemed involuntary by the court. *Id.* at **953.** This result would obtain because the lacing of alcohol with PCP is neither commonplace nor expected. Accordingly, determining whether intoxication is voluntary apparently turns on whether the use of the unknown intoxicant was reasonably foreseeable and not whether the adulterated substance was itself an intoxicant.

[60] *Id.* at **953.** The court also quoted with favor a passage from an earlier edition of R. Perkins, Criminal Law, that set forth the mistake theory of involuntary intoxication, discussed ***supra*** notes **19-24,** and accompanying text.

[61] R.C.M. 916(j).

[62] Note, *Recent Applications of the Mistake of Fact Defense,* The Army Lawyer, Feb. **1989,** at **66, 67.**

charged will not entitle him to the mistake of fact defense.[63] Likewise, a mistaken belief that homicide victims were detained prisoners of war (PW's) rather than noncombatants could not operate as a defense to murder, because killing a PW would also constitute the crime.[64] These results obtain because the requisite intent to commit the attempted illegal act transfers to the offense actually committed.[65]

These same principles should be applied to the issue of voluntariness in connection with "mistaken" intoxication. For example, an accused's intoxication as a result of consuming a "spiked" drink should be deemed involuntary only where the mistaken belief as to the substance consumed makes the accused's lack of sobriety not reasonably foreseeable to him. Put another way, where an accused would likely have become intoxicated regardless of whether the drink was "spiked," his intoxication as a result of consuming a "spiked" drink should be considered voluntary.

The following principles can, in summary, be derived from the cited authority. First, involuntary intoxication is a recognized defense under military law.[66] Second, involuntary intoxication may act as a defense to both specific and general intent crimes.[67] Third, the three major theories of involuntary intoxication--mistake, coercion, and medical prescription—are probably recognized under military law.[68] Fourth, the voluntary consumption of one intoxicant, under circumstances where the consumption of another intoxicant is

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[63]United States v. Jefferson, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating where accused accepted heroin thinking it was hashish); United States v. Coker, 2 M.J. 304, 308 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4M.J. 93 (C.M.A. 1977) (accused's belief that drug he sold was a contraband substance other than the charged substance not a defense); United States v. Anderson, 46 C.M.R. 1073, 1075 (A.F.C.M.R. 1973)(accused may not defend against charged LSD offense with belief he possessed mescaline); ***see*** United States v. Mance, 26 M.J. 244, 254 (C.M.A. 1988); United States v. Rowan, 16 C.M.R. 4, 7 (C.M.A. 1954).

[64]United States v. Calley, 46 C.M.R. 1131, 1179 (C.M.A. 1973)(requisite mental state for the charged offense of murder was met by the accused's intent to kill those he believed to be detained PW's). As an exception to this rule, the Court of Military Appeals has held that a mistake of fact as to the victim's consent may operate as a defense to rape, regardless of whether the accused would nonetheless be guilty of adultery. United States v. Carr, 18 M.J. 297, 301 (C.M.A. 1984).

[65]Note, ***Recent Applications*** of *the Mistake of Fact Defense*, The Army Lawyer, Feb. 1989, at 66, 67.

[66]United States v. Ward, 14 M.J. at 953-54; United States v. Craig, 3 C.M.R. at 311.

[67]*Compare* United States v. Ward, 14 M.J. at 951 (involuntary intoxication could be a defense to opening mail matter, which is a general intent crime) ***with*** MCM, 1984, R.C.M. 916(1)(2), *supra* note 9 (voluntary intoxication may raise a reasonable doubt only where actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense). ***See generally*** Kaczynski, *supra* note 8, at 2.

[68]United States v. Craig, 3 C.M.R. at 311.

reasonably foreseeable, renders intoxication from either source voluntary.[69] Finally, where an accused becomes drunk and intoxication is the gravamen of the offense, any subsequent action by the accused—even involuntary conduct—doesnot render the initial act of becoming intoxicated involuntary.[70]

B. INTOXICATION

The words "intoxicated" or "drunk," as used in the vernacular, do not necessarily equate to the legal term "intoxication."[71] In order to amount to intoxication in the legal sense, civilian law generally requires that the consumption of intoxicants be such as "to create a state of mental confusion, excluding the possibility of specific intent."[72] Thus, a defendant could be under the influence of an intoxicant and nonetheless not be intoxicated for purposes of negating a pertinent intent element of an offense.

Military decisional law[73] has likewise recognized that an accused can be "high" or "tight" without being intoxicated for purposes of a voluntary intoxication defense.[74] In *United States v. Herrera*,[75] for example, the board observed that merely because a person was under the influence of an intoxicant does not necessarily mean that he was so intoxicated as to render him mentally incapable of forming a

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[69] *See* United States v. Ward, 14 M.J. at 954.

[70] United States v. McCreary, 1 C.M.R. at 677.

[71] Arguably, intoxication could be so severe as to be equated to insanity. The relationship between the general excuse defense of intoxication and the defense of lack of mental responsibility is beyond the scope of this article.

[72] People v. Henderson, 138 Cal. App.2d 505, 292 P.2d 267 (1956); see R. Perkins, *supra* note 16, at 1013. Under military law, voluntary intoxication is also relevant to issues of premeditation, actual knowledge, and willfulness. MCM, 1984, R.C.M. 916(1)(2).

[73] In addition to decisional law, various Army regulations establish blood-alcohol-content (BAC) levels for intoxication. *E.g.*, *AR* 600-86, para. 1-10*b* (military personnel on duty will not have a BAC level of 0.05% or higher milligrams of alcohol per milliliter of blood while on duty); AR 190-5, paras 2-5 and 2-7 (military personnel will have driving privileges suspended or revoked and a general officer letter of reprimand issued to them if they operate a motor vehicle while having a certain BAC level, generally 0.1% or higher milligrams of alcohol per milliliter of blood).

"Indeed, the requirements for intoxication as a defense are more strict than the traditional definition for drunkenness as an element of an offense. *See* MCM, 1984, Part IV, para. 35c(3) ("Drunk" means any intoxication which is sufficient sensibly to impair the rational and full exercise of mental or physical faculties."); Manual for Courts-Martial, 1951 [hereinafter MCM, 1951], para. 191, at 347 ("intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness"). For example, a person's full exercise of his mental and physical faculties could be impaired, and yet he could still be capable of forming a specific intent.

[74] 28 C.M.R. 599 (A.B.R. 1959).

specific intent. In *United States* v. *Haas*[76] the board went even further, noting that a substantial impairment because of alcohol consumption is insufficient to raise intoxication if the accused retains the capacity to form the requisite specific intent.[77] Thus, an accused could providently plead guilty to disobeying an order even though he was drunk when he received it, provided that he was not too intoxicated to comply with the order.[78] Similarly, an accused could be convicted of resisting apprehension while he was intoxicated, provided that he was not so drunk as to be incapable of recognizing the status of the air policemen trying to apprehend him.[79]

Although the decisional law clearly holds that mere drunkenness does not necessarily equate to intoxication in the legal sense, the law is less clear in defining the term intoxication. A number of courts and boards have addressed the issue with regard to the sufficiency of instructions.[80] On other occasions, the issue has been framed in the context of a challenged guilty plea.[81] In neither set of circumstances are the decisions particularly helpful in defining intoxication, as the courts and boards are primarily concerned with

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[76]22 C.M.R. 868 (A.F.B.R.), ***pet. denied,*** 22 C.M.R. 381 (C.M.A. 1966).

[77]*Accord* United States v. Wright, 19 C.M.R. 331 (C.M.A. 1955).

[78]United States v. Burroughs, 37 C.M.R. 775 (C.G.B.R. 1966).

[79]United States v. Stone, 13 C.M.R. 906 (A.F.B.R. 1953).

[80]*E.g.*, United States v. Sasser, 29 C.M.R. 314 (C.M.A. 1960) (evidence sufficient to raise voluntary intoxication with respect to intentional infliction **of** grievous bodily harm); United States v. Hagelberger, 12 C.M.R. 15 (C.M.A. 1953) (evidence insufficient to raise voluntary intoxication with respect to murder and robbery); United States v. Miller, 7 C.M.R. 70 (C.M.A. 1953) (evidence sufficient to raise voluntary intoxication with respect to willful disobedience and disrespect to a superior officer); United States v. Drew, 4 C.M.R. 63 (C.M.A. 1952) (evidence sufficient to raise voluntary intoxication with respect to assault with intent to commit voluntary manslaughter); United States **v.** Hemenway, 23 C.M.A. 810 (A.F.B.R. 1956) (evidence sufficient to raise voluntary intoxication with respect to larceny); United States v. Roberts, 11 C.M.R. 477 (A.B.R. 1953) (evidence sufficient to raise voluntary intoxication with respect to lifting a weapon against a superior officer in the execution of his duties and disobedience of a superior officer); United States v. Owens, 11 C.M.R. 747 (A.F.B.R. 1953) (evidence sufficient to raise voluntary intoxication with respect to assault upon a superior noncommissioned officer); United States v. Olvera, 8 C.M.R. 419 (A.B.R. 1953), *aff'd*, 15 C.M.R. 134 (C.M.A. 1954) (evidence sufficient to raise voluntary intoxication with respect to assault with intent to inflict grievous bodily harm); United States v. Stevens, 7 C.M.R. 838 (A.F.B.R. 1953) (evidence sufficient to raise voluntary intoxication with respect to a knowingly fraudulent enlistment).

[81]*E.g.*, United States v. Frost, 38 C.M.R. 565 (A.B.R. 1967) (accused's guilty plea not rendered improvident by his statement that he was so drunk he was unable to remember exactly what happened); United States v. Moore, 6 C.M.R. 233 (A.B.R. 1952), pet. ***denied,*** 7 C.M.R. 84 (C.M.A. 1953) (accused's guilty plea not rendered improvident by defense counsel's argument that the accused was drunk); United States v Long, 6 C.M.R. 194 (A.B.R. 1952) (accused's guilty plea to wrongful appropriation rendered improvident by accused's statement that he was too drunk to remember taking the property or anything else that happened).

whether an issue as to intoxication has been raised and not with whether the accused was, in fact, intoxicated.

Military law is clear, however, that a drunken accused need not be comatose in order to be intoxicated in the legal sense. In *United States v. Guay*,[82] for example, the Army Board of Review found that the law officer's instruction imposed an excessively strict standard for intoxication. The law officer told the members that for ''drunkenness to be a defense, the accused must be so drunk that his mental motors must be stalled.''[83] The board found that the instruction equated intoxication with "ambulatory stupefaction" and thus exceeded the requirements for intoxication under military law.[84]

Rather than seeking to define intoxication in the abstract, military appellate courts have, as noted, generally taken a functional approach in addressing this issue. The courts have typically evaluated the extent of the alleged intoxication to see if it raised a reasonable doubt as to the accused's capacity to entertain the requisite intent to perpetrate the crime.[85] Accordingly, all aspects of the accused's conduct during the general time frame of the charged offenses may be relevant to the issue of intoxication. In *United States v. Bright*,[86] for example, the accused's ability to perform various tasks, recall events, fabricate an excuse, and understand instructions were relevant to the issue of whether he was so intoxicated that he could not specifically intend to wrongfully appropriate a van.[87]

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[82] 18 C.M.R. **351** (A.B.R. **1955).**

[83] *Id.* at **353.**

[84] *Id.*; ***see*** *also* United States v. Backley, **9** C.M.R. **126** (C.M.A. **1953); *but see*** United States v. Moore, **6** C.M.R. **233, 235** (A.B.R. 1952), ***pet. denied,*** **7** C.M.R. **84** (C.M.A. **1953)** ("dead drunkenness" required for intoxication); United States v. Ochrietor, **3** C.M.R. **592, 599** (A.B.R.), ***pet. denied,*** **4** C.M.R. **84** (C.M.A. **1952)** ("unconsciousness of the acts committed" required for intoxication).

[85] ***E.g.***, United States v. Bright, **20** M.J. **661** (N.C.M.R.), ***pet. denied,*** **21** M.J. **103** (C.M.A. **1985);** United States v. Deavers, 7 M.J. **677** (A.C.M.R. **1979).** Several older military cases also utilized a functional definition of intoxication in relation to its effect on the requisite intent required for the charged offenses. ***E.g.***, United States v. Roman, **2** C.M.R. **150, 154-58** (C.M.A. **1952).**

[86] 20 M.J. **661** (N.M.C.M.R.), ***pet. denied,*** **21** M.J. **103** (C.M.A. **1985).**

[87] *Id.* at **665; *see*** *also* United States v. Box, **28** M.J. **584** (A.C.M.R.), ***pet. denied,*** **28** M.J. **451** (C.M.A. **1989)** (instruction on voluntary intoxication not required where the accused's testimony was that he clearly remembered events, knew what he was doing, and intended to do what he did); United States v. Reece, **12** M.J. **770** (A.C.M.R. **1981)** (evidence does not support the accused's contention that he was intoxicated, where the accused was able to converse coherently, manipulate and enter a locked car, empty the contents of a glove box, and set the items and the car on fire). Military courts have traditionally examined the accused's conduct to assess the extent of his alleged intoxication. ***E.g.***, United States v. Hagelberger, **12** C.M.R. **15** (C.M.A. **1953)** (instruction on voluntary intoxication not required given the accused's ability to plan and outline all the details of his crimes and his ability later to recall and relate those details in his confession).

In summary, intoxication, as used in the sense of a criminal defense, will be determined on the basis of whether the accused had the capacity to entertain the requisite intent for the charged offense.[88] Ambulatory stupefaction is not required;[89] and mere drunkenness, without more, will not suffice.[90] The courts typically will examine the accused's conduct during the general time period when the crimes were committed in light of the intent required for the charged offense. These considerations will serve as the primary basis for evaluating whether the accused was so intoxicated as to qualify for the defense of voluntary intoxication.[91]

This functional approach for evaluating intoxication has evolved as a consequence of the development of the failure of proof defense of voluntary intoxication under military law. The development of this defense will be discussed next.

III. SUBSTANTIVE ASPECTS OF VOLUNTARY INTOXICATION AS A FAILURE OF PROOF DEFENSE UNDER MILITARY LAW

A. CRIMINAL DEFENSES GENERALLY

All criminal law defenses can be classified as being one of several types.[92] The generally recognized categories of defenses include

[88] *See* ***supra*** note 85 and accompanying text.
[89] United States v. Guay, 18 C.M.R. 351 (A.B.R. 1955).
[90] *See* ***supra*** notes 74-89 and accompanying text.
[91] *See* ***supra*** notes 85-87 and accompanying text.
[92] Accomplishing a systematic classification of criminal law defenses would necessarily require both a comparison of the defenses evaluated and an understanding of the internal structure of the defenses being compared. 1 P. Robinson, *supra* note 14, at 63. A comprehensive examination required for such a systematic approach is beyond the scope of this article. Instead, the status of the involuntary intoxication defense, in the context of criminal law defenses generally, will be briefly discussed. This should lend perspective to the more detailed examination of the voluntary intoxication defense undertaken later in this article.

failure of proof defenses,[93] offense modification defenses,[94] justification defenses,[95] excuse defenses,[96] and nonexculpatory defenses.[97]

Voluntary intoxication, depending upon the circumstances, can theoretically qualify as being one of two distinct kinds of defenses. First, if the intoxication is as detrimental to the actor's mental capacity as insanity, the actor may qualify for a general excuse defense.[98] This type of defense would exculpate the actor without regard to the specific elements of the offense charged or whether those elements were satisfied.[99] The general excuse defense of voluntary intoxication and the relationship between intoxication and insanity are beyond the scope of this article.[100]

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[93] "Failure of proof defenses consist of instances in which because of the conditions that are the basis for the 'defense,' all elements of the offense charged cannot be proven. They are in essence no more than a negation of an element required by the definition of the offense." ***Id.*** at 72 (footnote omitted). Examples of this type of defense depend largely upon the elements of proof of the offenses as set forth under the system or code involved. Alibi and good character are classic examples of failure of proof defenses. ***See*** R.C.M. 916(a) discussion.

[94] Offense modification defenses apply where all elements of the offense are satisfied. The conduct, nonetheless, is not considered criminal. This is because the actor has not caused the harm or evil sought to be prevented by the statute defining the offense. ***Id.*** at 77. As with failure of proof defenses, the application of offense modification defenses is primarily dependent upon the offense as defined by statute.

[95] Justification defenses apply where the harm caused by the nominally illegal conduct is "outweighed by the need to avoid an even greater harm or to further a greater societal interest." ***Id.*** at 83. Examples of justification defenses include necessity, self-defense, defense of another, and defense of property. 2 P. Robinson, ***supra*** note 14, § 124, at 131-34; ***see generally*** Milhizer, ***Necessity and the Military Justice System: A Proposed Special Defense***, 121 Mil. L. Rev. 95 (1988).

[96] Excuse defenses apply where the conduct is illegal but is nonetheless excused because the actor is not responsible for his conduct. 1 P. Robinson, ***supra*** note 14, at 91. Examples of excuse defenses include insanity and duress. 2 P. Robinson, ***supra*** note 14, at §§ 173 & 177.

[97] Under nonexculpatory defenses, the actor remains blameworthy but is not punished because of overriding public policy concerns. 1 P. Robinson, ***supra*** note 14, at 102-04. Examples of nonexculpatory defenses include statutes of limitations, diplomatic and other types of immunity, and entrapment. 2 P. Robinson, ***supra*** note 14, §§ 200-02, at 209.

[98] 1 P. Robinson, ***supra*** note 14, at 286; *cf.* United States v. Tuck, 29 C.M.R. 750 (C.G.B.R. 1960) (conviction for wrongful disobedience of orders set aside because the accused was so intoxicated that it was reasonably predictable that he could not obey the order).

[99] 1 P. Robinson, ***supra*** note 14, at 286.

[100] Several military cases have examined this issue. ***See, e.g.***, United States v. Thompson, 3 M.J. 271 (C.M.A. 1977); United States v. Lewis, 33 C.M.R. 291 (C.M.A. 1963). The issue has sometimes been framed in terms of pathological intoxication. ***See, e.g.***, United States v. Santiago-Vargas, 5 M.J. 41 (C.M.A. 1978); United States v. Gertson, 15 M.J. 990 (N.M.C.M.R. 1983); ***see generally*** Model Penal Code § 2.08(4) (proposed official draft 1962).

Second, an intoxicated actor might qualify for a failure of proof defense, provided that his condition was sufficient to negate the culpable state of mind required for the offense as defined.[101] Military law has favored having voluntary intoxication operate as a failure of proof defense and has resisted any recognition of it as a general excuse defense. The origins of voluntary intoxication as a failure of proof defense will be examined in the following section.

B. THE ORIGINS OF VOLUNTARY INTOXICATION AS A FAILURE OF PROOF DEFENSE

Military law has long recognized that voluntary intoxication can legitimately operate as a failure of proof defense. Colonel Winthrop stated the early military rule as follows:

> [T]he question whether or not the accused was drunk at the time of the commission of the criminal act may be material as going to indicate what species or quality of offence was actually committed. Thus there are crimes, or instances of crimes, which can be consummated only where a peculiar and distinctive intent, or a conscious deliberation or premeditation, has occurred with the act, which could not well be possessed or entertained by an intoxicated person. In such cases evidence of the drunken condition of the party at the time of his commission of the alleged crime is held admissible, not to excuse or extenuate the act as such, but to aid in determining whether, in view of the state of his mind, such act amounted to the specific crime charged, or which of two or more crimes, similar but distinguished in degree, it really was in law.[102]

An early version of the Manual *for* Courts-Martial stated the defense in the following terms:

> *Drunkenness*—It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense.[103]

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[101] 1 P. Robinson, *supra* note 14, at 286.

[102] W. Winthrop, *supra* note 7, at 293 (emphasis in original).

[103] Manual for Courts-Martial, United States, 1928 [hereinafter MCM, 1928], Courts-Martial Rule of Evidence 126*a*, at 136; ***see*** Manual for Courts-Martial, United States, 1917 [hereinafter MCM, 1917], paras. 285-86, at 135-36.

The parameters of the defense of voluntary intoxication remained largely unchanged in subsequent editions of the *Manual for Courts-Martial*.[104]

The military rule thus reflects a refinement of the common law defense of voluntary intoxication consistent with the general trend toward recodification. Under the common law approach, voluntary intoxication was permitted as a defense to specific intent offenses while being barred as a defense to general intent crimes.[105] This approach, however, had several problems. Central among these was the difficulty of adequately distinguishing between specific and general intent offenses.[106]

With the trend toward recodification, civilian jurisdictions began to focus on the particular states of mind that were statutorily required for the offense under consideration.[107] Where these special states of mind could be negated by intoxication, the failure of proof defense would apply. Under this approach, voluntary intoxication typically negated elements such as purpose, motive, or specific intent.[108]

The presently recognized defense of voluntary intoxication as set forth in the *Manual for Courts-Martial*[109] is consistent with this approach of focusing upon the special state of mind, if any, which is statutorily required to commit the offense. The *Manual* provides that "actual knowledge, specific intent, willfulness, or a premeditated design to kill"[110] can be negated by voluntary intoxication. Each of these special states of mind as they relate to the defense of voluntary intoxication will be considered separately.

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[104] MCM, 1951, para. 154*a*(2), at 294-95; Manual for Courts-Martial, United States, 1969, Revised edition, para. 154*a*(3), at pp. 27-71 to 27-72 [hereinafter MCM, 1969]; MCM, 1984, R.C.M. 916(1)(2).

[105] 1 P. Robinson, *supra* note 14, at 291-92; *see id.* at 291 n.11 for a detailed list of civilian cases which follow the common law approach.

[106] *See, e.g.*, G. Fletcher, Rethinking Criminal Law 849 (1978) ("general intent is the intent accompanying the base offense; the specific intent goes beyond the base offense to reach further unrealized objectives"); W. LaFave & A. Scott, Handbook on Criminal Law 343 (1972) (specific intent is some intent in addition to the intent to do the physical act which the crime requires; and general intent is the intent to do the physical act, or perhaps recklessly doing the physical act, which the crime requires); Roth, *General vs Specific Intent*, 7 Pepperdine L. Rev. 67, 71-75 (1979) (specific intent means purposeful; general intent means all other states of mind). *See generally* 1 P. Robinson, *supra* note 14, at 297-301, for a discussion of problems with the common law approach.

[107] 1 P. Robinson, *supra* note 14, at 297.

[108] *Id.*

[109] MCM, 1984, R.C.M. 916(1)(2).

[110] *Id.*

C. VOLUNTARY INTOXICATION AS IT PERTAINS TO ACTUAL KNOWLEDGE

Where "actual knowledge" is an element of an offense, the defense of voluntary intoxication can operate to negate that element."[111] Actual knowledge is always at issue when the accused's recognition of the status of the victim is an element of the charged offense. The accused's knowledge of the victim's status is an element of several common offenses under military law, including disrespect to a superior commissioned officer;[112] assaulting or willfully disobeying a superior commissioned officer;[113] and insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer.[114]

The military appellate courts and boards have uniformly permitted voluntary intoxication to operate as a defense to these crimes. In particular, voluntary intoxication can act as a defense to a disrespect charge, as the accused must be aware of the victim's status when the offense is perpetrated.[115] The accused must likewise be aware of the status of the person issuing a military order for obedience to be required, so voluntary intoxication will be permitted as a defense to a charge of disobeying a lawful order.[116] Certain ag-

[111] *Id.*

[112] UCMJ art 89; *see* MCM, 1984, Part IV, para. 13b(4) ("[t]hat the accused then knew that the commissioned officer toward whom the acts, omissions, or words were directed was the accused's superior commissioned officer").

[113] UCMJ art. 90; *see* MCM, 1984, Part IV, paras. 14b(1)(c) & b(2)(c) ("[t]hat the accused then knew that this officer was the accused's superior commissioned officer").

[114] UCMJ art. 91; *see* MCM, 1984, Part IV, paras. 15b(1)(a) ("[t]hat the accused then knew that the person struck or assaulted was a warrant, noncommissioned, or petty officer"), 15b(2)(c) ("[t]hat the accused then knew that the person giving the order was a warrant, noncommissioned, or petty officer"), 15b(3)(d) ("[t]hat the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer"), and 15b(3)(h) ("[t]hat the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned, warrant, or petty officer").

[115] *See* United States v. Lucy, 27 C.M.R. 238 (C.M.A. 1958); United States v. Miller, 7 C.M.R. 70 (C.M.A. 1953); United States v. Brown, 11 C.M.R. 332 (A.B.R. 1953); United States v. Higgins, 10 C.M.R. 453 (A.B.R. 1953); United States v. O'Neil, 8 C.M.R. 669 (A.F.B.R. 1953); United States v. Shirley, 3 C.M.R. 839 (A.F.B.R. 1952).

[116] *See* United States v. Oisten, 33 C.M.R. 188 (C.M.A. 1963); United States v. Lucy, 27 C.M.R. 238 (C.M.A. 1958); United States v. Miller, 7 C.M.R. 70 (C.M.A. 1953); United States v. Roberts, 12 C.M.R. 477 (A.B.R. 1953); United States v. Alexander, 11 C.M.R. 489 (A.B.R. 1953); United States v. Brown, 11 C.M.R. 332 (A.B.R. 1953); United States v. Higgins, 10 C.M.R. 453 (A.B.R. 1953); United States v. Carpenter, 5 C.M.R. 248 (A.B.R. 1952). Colonel Winthrop noted similarly:

> And where a deliberate purpose or peculiar intent is necessary to constitute the offence, as in cases of disobedience of orders in violation of Art. 21, desertion, mutiny, cowardice, or fraud in violation of Art. 60, the drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defence to the specific act charged.

W. Winthrop, *supra* note 7, at 293-94.

gravated assault offenses also require that the accused be aware of the victim's status, and thus voluntary intoxication is a recognized defense in these cases!" Special knowledge can be negated by voluntary intoxication in the case of several other offenses, including breach of arrest,[118] resisting apprehension,[119] provoking words,[120] failure to go,[121] and fraudulent enlistment.[122]

D. VOLUNTARY INTOXICATION AS IT PERTAINS TO SPECIFIC INTENT

Where "specific intent" is an element of an offense, the defense of voluntary intoxication can operate to negate that element.[123] As already noted, this application of the defense can be traced back to early military law[124] and the common law itself.[125] As Colonel Winthrop long ago observed:

> Thus in cases of such offenses as larceny, robbery, burglary, and passing counterfeit money, which require for their commission a certain specific intent, evidence of drunkenness is admissible as indicating whether the offender was capable of entertaining this intent, or whether his act was anything more than a mere battery, trespass, or mistake.[126]

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[117] *See* United States v. Johnson, 15 C.M.R. 149 (C.M.A. 1954) (alleged assault upon a commissioned officer); United States v. Oisten, 33 C.M.R. 188 (C.M.A. 1963) (assault upon a commissioned officer); United States v. Roberts, 12 C.M.R. 477 (A.B.R. 1953) (lifting a weapon *against* a superior commissioned officer in the execution of his duties); United States v. Clipner, 12 C.M.R. 364 (A.B.R. 1953) (assault upon a commissioned officer); United States v. Owens, 11 C.M.R. 747 (A.F.B.R. 1953) (assault upon a superior noncommissioned officer); United States v. Brown, 11 C.M.R. 332 (A.B.R. 1953) (assault upon a commissioned officer); United States v. Randolph, 5 C.M.R. 779 (A.F.B.R. 1952) (assault upon a person in the execution of air police duties).

[118] *See* United States v. Clipner, 12 C.M.R. 364 (A.B.R. 1953) (accused must know he was placed under arrest).

[119] *See* United States v. Stone, 13 C.M.R. 906 (A.F.B.R. 1953) (accused must know status of air policeman trying to apprehend him).

[120] *See* United States v. Noriega, 20 C.M.R. 893 (A.F.B.R. 1955) (accused must know the victim was subject to the UCMJ).

[121] United States v. Gilbert, 23 C.M.R. 914 (A.F.B.R. 1957) (accused must have specific knowledge of the time and place of the duty).

[122] United States v. Stevens, 7 C.M.R. 838 (A.F.B.R. 1953) (accused must knowingly make a false representation or intentionally conceal a fact which, if known, would prevent enlistment).

[123] MCM, 1984, R.C.M. 916(1)(2).

[124] *See supra* notes 102-08 and accompanying text.

[125] *See supra* note 105 and accompanying text.

[126] W. Winthrop, *supra* note 7, at 293.

Specific intent is an element of a wide variety or offenses under military law. For example, larceny and wrongful appropriation, a lesser included offense of larceny, each require that the accused have a particular specific intent.[127] Thus, where voluntary intoxication has been raised by the evidence, the courts and boards have permitted the defense to negate the requisite intent for larceny[128] and wrongful appropriation.[129] Similarly, as robbery[130] is a compound offense combining larceny and assault,[131] the specific intent element of robbery[132] can be negated by voluntary intoxication.[133]

Several types of aggravated assault offenses[134] have specific intent elements that can be negated by voluntary intoxication. Assault with the intentional infliction of grievous bodily harm, for example, requires that the accused specifically intend to inflict grievous bodily harm.[135] Voluntary intoxication, when raised by the evidence, can negate this intent requirement.[136] Voluntary intoxication likewise can negate the specific intent element of assault with intent to commit

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[127] *See* UCMJ art. **121;** MCM, **1984,** Part IV, paras. 46b(1)(d) (for larceny, the taking, obtaining, or withholding by the accused must be with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner); and 46b(2)(d) (for wrongful appropriation, the same intent **is** required **as** for larceny except that the deprivation, defrauding, or appropriation of the property is intended to be temporary rather than permanent).

[128] *See* United States v. Kauble, **15** M.J. **591** (A.C.M.R. 1983), *aff'd in part and rev'd in part on other grounds,* **22** M.J. **179** (C.M.A. **1986);** United States **v.** Beddingfield, **20** C.M.R. **840** (A.F.B.R. **1956);** United States v. Smith, 8 C.M.R. **655** (A.F.B.R. **1953);** United States v. McComis, **7** C.M.R. **534** (A.F.B.R. **1952);** United States v. Seward, **6** C.M.R. **841** (A.F.B.R. **1952);** United States v. Lavache, **5** C.M.R. **688** (A.F.B.R. **1952);** United States v. Wright, **5** C.M.R. **391** (A.B.R.), *aff'd on rehearing,* **6** C.M.R. **803** (A.B.R. **1952).**

[129] *See* United States v. Norris, 8 C.M.R. **36** (C.M.A. 1953), *rev'g* **7** C.M.R. **412** (A.B.R. **1952);** United States v. Whitten, 7 C.M.R. **799** (A.F.B.R. **1953);** United States v. Holder, **7** C.M.R. **688** (A.F.B.R. **1952);** United States **v.** Bailey, **6** C.M.R. **851** (A.F.B.R. **1952);** United States v. Lavache, **5** C.M.R. **688** (A.F.B.R. **1952).**

[130] UCMJ art **122;** *see* MCM, **1984,** Part IV, para. **47.**

[131] United States v. Chambers, **12** M.J. **443, 446** (C.M.A. **1982).**

[132] MCM, **1984,** Part IV, para. 47b(6) (the taking of the property by the accused must be done with the intent permanently to deprive the person robbed of the use and benefit of the property).

[133] *See* United States v. **Park, 25** C.M.R. **841** (A.F.B.R. **1958);** United States v. Weinberger, **13** C.M.R. **626** (A.F.B.R. **1953).**

[134] UCMJ art. **128;** *see* United States v. Craig, **3** C.M.R. **305** (A.B.R. **1952).**

[135] MCM, **1984,** Part IV, para. 54c(4)(b). Culpable negligence will not suffice. *Id.*

[136] United States v. Sasser, **29** C.M.R. **314** (C.M.A. **1960);** United States **v.** Backley, **9** C.M.R. **126** (C.M.A. **1953);** United States **v.** Rouillard, **6** C.M.R. **341** (A.B.R. 1952), *pet. **denied,*** **7** C.M.R. 84 (C.M.A. **1953).**

rape,[137] assault with intent to commit voluntary manslaughter,[138] and assault with intent to commit murder.[139]

All attempt offenses under military law are specific intent crimes.[140] Accordingly, voluntary intoxication will be a defense to an attempt offense, even if the substantive offense that is attempted does not have a specific intent requirement. For example, sodomy[141] is a general intent offense under military law for which voluntary intoxication is not a defense;[142] however, voluntary intoxication is a defense to the specific intent offense of attempted sodomy243

The courts and boards have held that voluntary intoxication is a defense to other specific intent offenses under military law. In ***United States v. Noriega***[144] the board determined that voluntary intoxication can be a defense to communicating a threat, as that offense requires the accused have a present determination or intent to carry out the threat.[145] In ***United States v. Daniel***[146] the board found that voluntary intoxication can be a defense to a charge of housebreaking[147] with the intent to commit an indecent assault. Numerous other offenses have specific intent requirements under military law,[148] and presumably voluntary intoxication could operate as a failure of proof defense in those cases as well.[149]

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[137]*See* United States v. Whitlow, **26** C.M.R. **666** (A.B.R. **1958);** United States **v.** Jackson, **6** C.M.R. **390** (A.B.R. 1952), ***pet. denied,*** **8** C.M.R. **178** (C.M.A. **1953);** United States v. Gethard, **3** C.M.R. **712** (A.F.B.R. **1963);** ***see also*** United States v. Short, **16** C.M.R. **11, 20** (C.M.A. **1954)** (Brosman, J., concurring and dissenting).

[138]*See* United States v. Drew, **4** C.M.R. **63** (C.M.A. **1952).**

[139]United States v. Mitchell, **2** C.M.R. 448, **452** (A.B.R. **1952).**

[140]UCMJ art. **80;** ***see*** MCM, **1984,** Part IV, para. 4b(2) (the act must be done with the specific intent to commit an offense under the UCMJ).

[141]UCMJ art. **125;** ***see*** MCM, **1984,** Part IV, para. **51.**

[142]United States v. Chauncy, **16** C.M.R. **395** (N.B.R. **1954).**

[143]United States v. Miller, **7** C.M.R. **325** (A.B.R. **1953).**

[144]20 C.M.R. **893** (A.F.B.R. **1954).**

[145]*See* MCM, **1984,** Part IV, para. 110b(1).

[146]7 C.M.R. **777** (A.F.B.R.), ***pet. denied,*** **9** C.M.R. **139** (C.M.A. **1953).**

[147]UCMJ *art.* **130;** ***see*** MCM, **1984, Part IV,** para. 56b(2) (the accused must have entered the building or structure with the intent of committing a criminal offense therein).

[148]*See* ***generally*** MCM, **1984, Part** IV.

[149]Some problematic exceptions to this rule—namely unpremeditated murder, murder **by** an act inherently dangerous to others, maiming, and indecent assault—are discussed at ***infra*** notes **176-247** and accompanying text.

E. VOLUNTARY INTOXICATION AS IT PERTAINS TO WILLFULNESS

Where "willfulness" is an element of an offense, the defense of voluntary intoxication can operate to negate that element.[150] Historically under military law, the application of voluntary intoxication to crimes involving willfulness has arisen in two distinct circumstances. On several occasions, the military appellate authorities have recognized that voluntary intoxication can be a defense to the crime of willfully damaging or destroying military property.[151] In another group of cases, the courts and boards have recognized that voluntary intoxication can be a defense to the crime of willfully discharging a firearm under circumstances that endanger human life.[152]

F. VOLUNTARY INTOXICATION AS IT PERTAINS TO PREMEDITATION

Under military law, the defense of voluntary intoxication can operate to negate the element of premeditation[153] for a charge of murder.[154] It will not, however, reduce murder to manslaughter or

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[150] MCM, 1984, R.C.M. 916(1)(2).

[151] UCMJ art. 108; *see* MCM, 1984, Part IV, para. 32b(2)(c) (damage, destruction or loss of military property was willfully caused by the accused). *Cases* which recognized the defense of voluntary intoxication for this offense included United States v. Groves, 10 C.M.R. 39 (C.M.A. 1953); United States v. Whelehan, 10 M.J. 566 (A.F.C.M.R. 1980); and United States v. Harper, 5 C.M.R. 435 (A.F.B.R. 1952).

[152] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 81b(2) (the accused discharged a firearm willfully and wrongfully). Cases that recognize the defense of voluntary intoxication for this offense include United States v. Christey, 6 C.M.R. 379 (A.B.R. 1952), *pet.* denied, 7 C.M.R. 84 (C.M.A. 1953); and United States v. Rouillard, 6 C.M.R. 341 (A.B.R. 1952), *pet.* denied, 7 C.M.R. 84 (C.M.A. 1953).

[153] MCM, 1984, R.C.M. 916(1)(2). The Manual defines premeditation as follows:

> A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

Id., Part IV, para. 43c(2)(a).

[154] UCMJ art. 118[1]1; *see* MCM. 1984. Part IV, para. 43b(1)(d) ("at the time of the killing, the accused had a premeditated design to kill").

any other lesser offense.[155]

The defense of voluntary intoxication for the element of premeditation has long been recognized in the military. As Colonel Winthrop wrote:

> [U]pon an indictment for murder, testimony as to the inebriation of the accused at the time of the killing may ordinarily properly be admitted as indicating a mental excitement, confusion, or unconsciousness, incompatible under the circumstances of the case with premeditation or a deliberate intent to take life, and as reducing the crime to the grade of manslaughter, or—where such an offense is created by the State statute—of murder in the second (or other) degree. On the other hand, where, to constitute the legal crime, there is required no peculiar intent—no wrongful intent other than that inferable from the act itself—as in cases of assault and battery, rape, or arson, evidence that the offender was intoxicated would, strictly, not be admissible in defence.[156]

This distinction between premeditated and unpremeditated murder is purportedly founded upon common law and Supreme Court precedent.[157]

Despite the potential availability of the defense of voluntary intoxication, courts-martial convictions for premeditated murder have rarely been reversed on that basis. When the issue has been addressed on appeal, military courts and boards have usually found the evidence to be insufficient to raise the defense of voluntary intox-

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[155]MCM, 1984, R.C.M. 916(1)(2) discussion, and Part IV, para. 43c(2)(c); see United States v. Judkins, 34 C.M.R. 232 (C.M.A. 1964); United States v. Roman, 2 C.M.R. at 158; United States v. Seeloff, 15 M.J. 978 (A.C.M.R.), *pet. denied,* 17 M.J. 18 (C.M.A. 1983); United States v. Trower, 2 M.J. 492 (A.C.M.R. 1976); United States v. Jackson, 40 C.M.R. 355 (A.B.R. 1968), *pet. denied,* 39 C.M.R. 293 (C.M.A. 1969); United States v. Sims, 6 C.M.R. 236 (A.B.R. 1952), *pet. denied,* 7 C.M.R. 84 (C.M.A. 1953).

[156]W. Winthrop, *supra* note 7, at 293 (footnotes omitted).

[157]*See, e.g.*, Hopt v. People, 104 U.S. 631 (1881). In *Hupt* the Supreme Court observed:

> At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question of whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject for consideration by the jury.

Id. at 633-34. For a critical discussion of the military's application of this rule, see *infra* notes 199-247 and accompanying text.

ication.[158] Even where the evidence was sufficient to raise the defense, one board of review found that the failure to instruct on voluntary intoxication was waived by the defense's failure to object to the instructions as given.[159] Only in *United States* v. *Morphis*[160] was a conviction for premeditated murder set aside because of voluntary intoxication. In *Morphis* a majority of the court found that although the law officer properly decided to instruct on voluntary intoxication, the instructions as given improperly shifted the burden of proof to the defense.[161] The case was consequently returned to The Judge Advocate General for referral to a board of review, which could have either ordered a rehearing on the charge of premeditated murder or affirmed a conviction for unpremeditated murder.[162]

G. OFFENSES FOR WHICH VOLUNTARY INTOXICATION HAS CORRECTLY BEEN REJECTED AS A DEFENSE

As noted, voluntary intoxication generally will act as a failure of proof defense for all offenses under military law[163] having as an element either actual knowledge, specific intent, willfulness, or premeditation.[164] The converse is also true—where an offense does not have one of these special elements, voluntary intoxication may not serve as a failure of proof defense.[165]

Several appellate decisions have explicitly disallowed the defense of voluntary intoxication for certain general intent offenses under military law. Voluntary intoxication, for example, is not a defense to the general intent crimes of maltreatment of a subordinate, provoking words to a subordinate, disorderly conduct within a military

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[158] *See, e.g.*, United States v. Seeloff, 15 M.J. 978 (A.C.M.R.) *pet. denied*, 17 M.J. 18 (C.M.A. 1983); United States v. Matthews, 13 M.J. 501, 517 (A.C.M.R. 1982), *aff'd in part and rev'd in part on other grounds*, 16 M.J. 354 (C.M.A. 1983); United States v. Craig, 3 C.M.R. 305 (A.B.R. 1952); United States v. Mitchell, 2 C.M.R. 448, 452 (A.B.R. 1952); United States v. Orosco, 2 C.M.R. 223, 227 (A.B.R. 1951).

[159] United States v. Craig, 3 C.M.R. at 311-12.

[160] 23 C.M.R. 212 (C.M.A. 1957).

[161] *Id.* at 219.

[162] *Id.*

[163] Exceptions to this rule will be discussed at *infra* notes 176-247 and accompanying text.

[164] MCM, 1984, R.C.M. 916(1)(2).

[165] Voluntary intoxication can still be considered as a matter in extenuation and mitigation for sentencing purposes. *See* United States v. Wade, 4 C.M.R. 51 (C.M.A. 1952); United States v. Chalcraft, 14 C.M.R. 609 (A.F.B.R. 1954).

compound, and assault with a dangerous weapon.[166] Similarly, assault by offer and violation of a regulation by possessing a prohibited weapon are general intent offenses for which voluntary intoxication is not a defense.[167] Voluntary intoxication is likewise not a defense to a charge of sodomy.[168]

In other cases, the appellate authorities have affirmed convictions of lesser included offenses requiring only general intent, where voluntary intoxication has acted as a defense to the greater crime. For example, simple assault upon an offer or battery theory can be affirmed as a lesser included offense, where voluntary intoxication is raised as to the greater offense of assault upon a person in the execution of police duties[169] or assault upon a superior noncommissioned officer.[170] Likewise, assault with a dangerous weapon upon an offer or battery theory can be affirmed as a lesser included offense of assault with intentional infliction of grievous bodily harm, where a dangerous weapon was used.[171] Careless discharge of a firearm and assault with a dangerous weapon can be affirmed as lesser included offenses of willful discharge of a firearm and assault with intentional infliction of grievous bodily harm, respectively.[172] Where disobedience of a superior noncommissioned officer's order is disallowed because of voluntary intoxication, the lesser included offense of a simple disobedience can nonetheless be affirmed.[173] Wrongfully damaging government property can be affirmed where willful damage to government property is disallowed because of voluntary intoxication.[174] Wrongful taking, however, cannot be affirmed as a lesser included offense of larceny or wrongful appropriation, as it is not recognized as being a crime under military law.[175]

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[166]United States v. Welsh, 15 C.M.R. 573 (N.B.R. 1954); but see United States v. Noriega, 20 C.M.R. 893 (A.F.B.R. 1955) (the offense of provoking words requires that the accused know the victim was subject to the UCMJ).
[167]United States v. Gohougan, 25 C.M.R. 750 (C.G.B.R. 1958).
[168]United States v. Chauncy, 16 C.M.R. 395 (N.B.R. 1954).
[169]United States v. Randolph, 5 C.M.R. 779 (A.F.B.R. 1952).
[170]United States v. Owens, 11 C.M.R. 747 (A.F.B.R. 1953).
[171]United States v. Backley, 9 C.M.R. 126 (C.M.A. 1953).
[172]United States v. Rouillard, 6 C.M.R. 341 (A.B.R. 1952), pet. *denied,* 7 C.M.R. 84 (C.M.A. 1953).
[173]United States v. Carpenter, 5 C.M.R. 248 (A.B.R. 1952).
[174]United States v. Harper, 5 C.M.R. 434 (A.F.B.R. 1952).
[175]United States v. Norris, 8 C.M.R. 36 (C.M.A. 1953).

H. OFFENSES FOR WHICH VOLUNTARY INTOXICATION HAS INCORRECTLY BEEN REJECTED AS A DEFENSE

Other military appellate decisions disallowing the failure of proof defense of voluntary intoxication are more doubtful. In *United States v. Tua*,[176] for example, the Army Court of Military Review held that maiming[177] requires only a general criminal intent.[178] The court concluded, therefore, that voluntary intoxication could not operate as a defense to a charge of maiming.[179]

To be guilty of maiming under military law, however, the accused must injure his victim with the specific intent of causing some injury.[180] The *Manual* defines the requisite intent for maiming as follows:

> Maiming requires a specific intent to injure generally but not a specific intent to maim. Thus, one commits the offense who intends only slight injury, if there is in fact infliction of an injury of the type specified in the article. Infliction of the type of injuries specified in the article upon the person of another may support an inference of the intent to injure, disfigure, or disable.[181]

This requirement for a specific intent to injure for maiming was explicitly recognized by the Court of Military Appeals in *United States v. Hicks*.[182] Accordingly, voluntary intoxication should logically be permitted to act as a failure of proof defense for maiming under military law.

The Army Court's decision in *Tua*,[183] which is contrary to the pertinent provision of the *Manual*[184] and precedent,[185] is clearly wrong.

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[176] 4 M.J. 761 (A.C.M.R. 1977), pet. *denied*, 5 M.J. 91 (C.M.A. 1978).
[177] UCMJ art. 124; *see* MCM, 1984, Part IV, para. 50.
[178] *Tua*, 4 M.J. at 763.
[179] *Id.*
[180] MCM, 1984, Part IV, para. 50b(3).
[181] *Id.*, para. 50c(3).
[182] 20 C.M.R. 337, 340 (C.M.A. 1956). The court stated that maiming requires "an intent to injure, not an intent to seriously injure." Id. In *Tua*, the Army Court of Military Review cited the *Hicks* decision and summarily distinguished it. *Tua*, 4 M.J. at 763.
[183] 4 M.J. 761 (A.C.M.R. 1977), pet. *denied*, 5 M.J. 91 (C.M.A. 1978).
[184] MCM, 1984, Part IV, paras. 50b(3) and 50c(3).
[185] United States v. Hicks, 20 C.M.R. 337 (C.M.A. 1956).

Whether this decision is merely an aberration[186] or is instead symptomatic of a more generalized tendency by military authorities to apply the defense of voluntary intoxication in a result-oriented manner is not entirely clear. At least one other example of a *similar* refusal to allow the defense of involuntary intoxication for seemingly result-oriented purposes is, however, apparent.

The military appellate decisions refusing to allow the defense of voluntary intoxication for indecent assault[187] are analytically unsound. The 1984 *Manual*, consistent with the previous editions,[188] has defined indecent assault as a specific intent offense. The second element of proof for indecent assault, as set forth in the *Manual*,[189] requires that "the acts were done [by the accused] with the intent to gratify the lust or sexual desires of the accused."[190] An early appellate decision construed the requirement as establishing that indecent assault is a specific intent offense for which voluntary intoxication could provide a defense.[191]

Subsequent decisional authority has instead held that voluntary intoxication is not a defense to indecent assault. In *United States v. Jackson*[192] the board determined that intoxication, short of debilitation equal to insanity, was not a defense to an indecent assault charge.[193] The board conceded that an element of proof for indecent assault requires that the accused specifically intend to gratify his lust or sexual desires. It found, however, that evidence of intoxication could not serve to rebut the presumption of such an intent that arises from the completed acts of the accused.[194] A later board decision explicitly adopted the *Jackson*[195] rationale while rejecting the

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[186]*See generally* MCM, **1984, Part** IV, para. 50c analysis at **A21-97.** To date, no other reported military case has held that maiming is a general intent offense.

[187]UCMJ **art. 134;** see MCM, **1984, Part** IV, para. **63.**

[188]*See supra* notes **103-10.**

[189]MCM, **1984.**

[190]*Id.*, Part IV, para. 63b(2).

[191]United States v. Rotramel, **4** C.M.R. **149** (A.B.R. **1952).**

[192]6 C.M.R. **390** (A.B.R. 1952), pet. denied, **8** C.M.R. **178** (C.M.A. **1953).**

[193]*Id.* at **395.**

[194]*Id.* In support of this position, the board drew an analogy to earlier cases addressing whether voluntary intoxication is a defense to unpremeditated murder. Id. (citing United States v. Roman, **2** C.M.R. **150** (C.M.A. **1951)).** Problems with the military's refusal to permit voluntary intoxication to operate as a defense for unpremeditated murder law was discussed at *supra* notes **153-62** and will be discussed further infra at notes **199-247** and accompanying text.

[195]United States v. Jackson, **6** C.M.R. **390** (A.B.R. 1952), *pet.* denied, **8** C.M.R. **178** (C.M.A. **1953).**

earlier decision[196] as being unsupported and incorrect.[197] In the cases that followed, the accepted rationale evolved further such that indecent assault was apparently no longer even characterized as being a specific intent offense.[198] Accordingly, voluntary intoxication could not, as a matter of law, operate as a defense to such a charge.

The better approach would be to recognize that, depending upon the nature of the alleged indecent act, a permissive inference is raised that the accused specifically intended to gratify his lust or sexual desires regardless of his degree of intoxication. For example, where the accused is alleged to have achieved an erection—and, of course, where he has allegedly ejaculated—the fact finder may reasonably infer that his lust and sexual desires were intentionally gratified despite his intoxicated condition. In extreme cases, the military judge may even possibly determine that the defense was not reasonably raised despite the accused's drunken condition and, therefore, that an instruction on voluntary intoxication is inappropriate as it is not supported by the evidence.

On the other hand, some misconduct otherwise constituting an indecent assault can be best explained by the perpetrator's intoxicated condition. For example, a drunken accused may unknowingly fondle another or may expose himself under otherwise indecent circumstances solely for the purpose of relieving himself. In these cases, the defense of voluntary intoxication should apply to exculpate the accused of the more serious crime of indecent assault. Whether the defense would exculpate a particular accused turns upon the facts of each case, including not only the alleged misconduct, but also the amount and type of intoxicant consumed. This approach is quite different—and certainly more sound—than finding, as a matter of law, that voluntary intoxication cannot operate as a defense to indecent assault.

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[196] United States v. Rotramel, 4 C.M.R. 149 (A.B.R. 1952).

[197] United States v. Miller, 7 C.M.R. 325 (A.B.R. 1953). In *Miller* the accused's conviction for attempted sodomy was reversed because of voluntary intoxication. *Id.* at 327. The board approved the accused's conviction for the lesser included offense of indecent assault. *Id.*

[198] *See* United States v. Whitlow, 26 C.M.R. 666 (A.B.R. 1958); United States v. Chalcraft, 14 C.M.R. 609 (A.F.B.R. 1954).

I. PROBLEMATIC REJECTION OF THE VOLUNTARY INTOXICATION DEFENSE

Legal scholars have historically confronted and often criticized the law of homicides.[199] As one commentator observed nearly fifty years ago:

> [T]he student of criminal law is confronted first with historical considerations of the bases for criminal liability, and then with subsequent modifications of those beginning principles. Murder early came to be a homicide committed with malice aforethought. Because of the unfortunate choice of this phrase "malice aforethought" to distinguish the offense, it had subsequently to be twisted out of its ordinary and logical sense into a peculiar, technical connotation.[200]

Perhaps the best example of how this concept of malice aforethought has been distorted in the context of the military's law pertaining to homicide is the rejection of voluntary intoxication as a partial defense for unpremeditated murder. As noted earlier, military law is clear that unpremeditated murder will not be reduced to a lesser included offense, such as manslaughter, because of voluntary intoxication.[201] This categorical rejection of voluntary intoxication as a failure of proof defense to unpremeditated murder is, however, subject to criticism.

Unpremeditated murder under military law is, on its face, a specific intent crime. The fourth and final element of proof of the offense of unpremeditated murder requires that "at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person."[202] Military decisional law has clearly required proof of in-

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[199] *See, e.g.*, Wechsler & Michael, *A Rationale of the Law of Homicide: I*, 37 Columbia L. Rev. 701-02 (1937) (and the authorities cited therein).

[200] Note, *The Negligent Murder*, 28 Kentucky Law Journal 53 (1940).

[201] *Supra* note 155.

[202] MCM, 1984, Part IV, para. 43b(2)(d). The intent requirement, as used in this context, is specifically defined in the *Manual* as follows:

> *Intent.* An unlawful killing without premeditation is also murder when the accused has either an intent to kill or inflict great bodily harm. It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that is existed at the time of the act or omission (except if death is inflicted in the heat of a sudden passion caused by adequate provocation). For

tent to kill or inflict great bodily harm as an element of unpremeditated murder.[203] Thus, an accused could not recklessly or negligently commit unpremeditated murder under article 118(2) as defined by military law.[204]

The practice of allowing voluntary intoxication to act as a partial defense to premeditated murder, but as no defense to unpremeditated murder, seems analytically untenable.[205] The sole element of proof that distinguishes premeditated murder and unpremeditated murder—premeditation—is an illusory concept at best.[206] Under military law, both forms of murder require that the accused have the specific intent to kill.[207] For premeditated murder, the accused must, additionally, consider the killing act.[208] Although this consideration must precede the killing act, it need not exist for any measurable or particular length of time.[209] Premeditated design to kill under military law thus "falls far short of 'deliberation'"[210] as required by many state statutes. As a practical matter, therefore, unpremeditated murder is rarely charged as the principal offense but is instead often found as a result of partial jury nullification.[211] Given both this amorphous definition of premeditation and the specific intent require-

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example, a person committing housebreaking who strikes and kills the householder attempting to prevent flight can be guilty of murder even if the householder was not seen until the moment before striking the fatal blow.

Id., Part *IV*, para. 43c(3)(a) (citation omitted).

[203] *E.g.*, United States v. Varraso, 21 M.J. 129, 132, 134-35 (C.M.A. 1985); United States v. Owens, 21 M.J. 117, 119, 126 (C.M.A. 1985).

[204] A homicide caused by recklessness or culpable negligence constitutes involuntary manslaughter under military law. UCMJ art. 119; MCM, 1984, Part IV, para. 44b(2). A homicide caused by a simple neghgence constitutes neghgent homicide under military law. UCMJ art. 134; MCM, 1984, Part IV, para. 85.

[205] Indeed, the Court of Military Appeals has conceded that finding the accused had the requisite intent and malice for murder when he is intoxicated is "fictive" and "supposititious." United States v. Stokes, 19 C.M.R. 191, 196-97 (C.M.A. 1955).

[206] *Compare* MCM, 1984, Part IV, para. 43b(1) (premeditated murder), *with id.*, Part IV, para. 43b(2) (unpremeditated murder). Judge Cardozo has observed that the distinction of these elements has, over time, left nothing precise as to the crucial state of mind but an intention to kill. B. Cardozo, *What Medicine Can Do For Law* (1928), in Law and Literature 70, 96 (1930).

[207] *See* MCM, 1984, Part IV, para. 43b(1)(d) & (2)(d). Unpremeditated murder can also be constituted where the accused has an intent to inflict great bodily harm. *id.*

[208] The *Manual*'s definition of premeditation is quoted at *supra* note 153. *See* United States v. Teeter, 16 M.J. 68, 71-72 (C.M.A. 1983).

[209] MCM, 1984, Part IV, para, 43c(2)(a).

[210] United States v. Matthews, 16 M.J. 354, 379 (C.M.A. 1983); *see generally* Pfau & Milhizer, *The Military Death Penalty and the Constitution: There is Life After Furman*, 97 Mil. L. Rev. 35, 47-60 (1982).

[211] Most of the reported decisions involving convictions for unpremeditated murder reflect that the accused was initially charged with premeditated murder. *E.g.*, *Varraso*, 21 M.J. at 129.

ment for unpremeditated murder, few if any circumstances could be plausibly imagined where an accused's intoxication could factually negate the requisite intent for premeditated murder but not the intent for unpremeditated murder.

Indeed, military decisional law has allowed voluntary intoxication to operate as a failure of proof defense where the intent element of unpremeditated murder has arisen in the context of other crimes. For example, in *United States* v. *Mitchell*[212] the Army Board of Review held that voluntary intoxication can negate the specific intent element of assault with intent to commit murder.[213] In *United States v. Sasser*[214] the Court of Military Appeals held that voluntary intoxication can negate the specific intent element of assault with the intent to inflict grievous bodily harm.[215] The rule that disallows voluntary intoxication as a defense for unpremeditated murder under article 118(2) seems inconsistent with this precedent.

The decisional roots of the exception to the military rule for unpremeditated murder are complex. The seminal military case establishing that voluntary intoxication is not a defense for unpremeditated murder is *United States* v. *Roman*.[216] In *Roman* the accused entered a Korean town hall in an intoxicated condition while carrying an M-1 rifle.[217] After firing one shot into the ceiling, the accused "covered" a squad leader near the door to the room and fired a second shot.[218] The bullet struck the squad leader, who later died as a result of the shooting.[219]

The accused was charged with unpremeditated murder.[220] Despite substantial evidence that the accused was intoxicated at the time of the shooting, the law officer failed to instruct on voluntary intoxication as being a defense to the charged offense.[221] The accused was ultimately convicted of unpremeditated murder and appealed, contending, inter alia, that the failure of the law officer to instruct upon the defense of voluntary intoxication constituted prejudicial error.

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[212] 2 C.M.R. 448 (A.B.R. 1952).
[213] *Id.* at 452.
[214] 29 C.M.R. 314 (C.M.A. 1960).
[215] *Accord* United States v. Backiey, 9 C.M.R. 126 (C.M.A. 1953); United States v. Rouillard, 6 C.M.R. 341 (A.B.R. 1952), *pet. h i e d ,* 7 C.M.R. 84 (C.M.A. 1953).
[216] 2 C.M.R. 150 (C.M.A. 1952).
[217] *Id.* at 152.
[218] *Id.*
[219] *Id.* at 152-53.
[220] *Id.* at 153.
[221] *Id.* at 154.

The Court of Military Appeals disagreed, holding that voluntary intoxication was not a defense to unpremeditated murder.[222] In support of its holding, the court cited a series of civilian court decisions from various jurisdictions that construed local statutory requirements for second degree murder. The majority of these cases held that voluntary intoxication would not reduce second degree murder to manslaughter or some other lesser offense.[223] The Court of Military Appeals based its decision upon the greater weight of this civilian authority.

The court's reliance on these civilian decisions is arguably misplaced. Under the civilian systems that were considered in the cited cases, second degree murder apparently required only that the defendant commit the homicide with "malice aforethought."[224] Although malice aforethought requires a predetermination to do an illegal act, it does not necessarily require a predetermination of intent to kill or inflict grievous bodily harm.[225] Thus, the accused in *Roman* would presumably be guilty of second degree murder under one of these civilian statutes if he intentionally robbed the town hall or resisted apprehension there and the resulting homicide was a consequence of his perpetration of a felony or his reckless indifference.[226] Under these same facts, however, he should presumably be not guilty of unpremeditated murder under article 118(2), as the killing would not have been preceded by the accused's intent to kill or grievously injure as required in the *Manual*.[227] The court in *Roman* did not address this fine but potentially crucial distinction, which has not been discussed by the military's appellate courts to the present day.[228]

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[222] *Id.* at 157.

[223] *Id.* at 154-57.

[224] *See, e.g.*, Bishop v. United States, 107 F.2d 297, 301-02 (D.C. App. 1939) (cited in United States v. Roman, 2 C.M.R. at 156).

[225] *See generally* United States v. Vandenack, 15 M.J. 230, 232 (C.M.A. 1983); 2 Wharton's Criminal Law § 137 (C. Torcia 14th ed. 1979); W. Winthrop, *supra* note 7, at 672-73; Hoffheimer, *Intoxication and Extreme Recklessness Murder: Presenting and Preserving the Issues*, 25 Criminal Law Bulletin 123 (March-April 1989); Black's Law Dictionary 863 (5th ed. 1979).

[226] See generally the authorities cited *supra* note 225. Significantly, the law officer in *Roman* specifically instructed as to malice aforethought. 2 C.M.R. at 154.

[227] As with the 1984 *Manual*, the edition of the *Manual* then in effect had the same specific intent requirements for unpremeditated murder. MCM, 1951, para. 197*e*. The court in *Roman* addressed this issue by concluding that the intent to drink alone could be sufficient to establish malice aforethought. *Roman*, 12 C.M.R. at 157; *see* United States v. Ferguson, 38 C.M.R. 239, 241 (C.M.A. 1968).

[228] Malice aforethought was later recognized as constituting the intent element for UCMJ art. 118(3) (murder by inherently dangerous acts). United States v. Stokes, 19 C.M.R. 191 (C.M.A. 1955). Despite this development, present military law maintains that voluntary intoxication will not operate as a defense for unpremeditated murder. *See supra* note 155 and accompanying text.

Moreover, the Supreme Court's decision in ***Hopt v. People***[229] does not compel, as some contend, that the voluntary intoxication defense must be disallowed for unpremeditated murder under article 118(2). Quite to the contrary, the Court in ***Hopt*** observed that whether voluntary intoxication can act as a defense for a particular crime depends upon the elements of proof of the offense as defined by the pertinent statute.[230] As military law provides that unpremeditated murder under article 118(2) is a specific intent crime,[231] voluntary intoxication should logically be an available defense. Similarly, as murder by an act inherently dangerous to others[232] has, as an element, a special knowledge requirement,[233] voluntary intoxication should also apparently be an available defense for that crime.[234]

Indeed, the military's rejection of voluntary intoxication as a failure of proof defense for unpremeditated murder appears to be inconsistent with the Court of Military Appeals's recent decision in *Ellis v. Jacob*.[235] In ***Ellis*** the accused was charged with the unpremeditated murder of his eleven-year-old son.[236] The accused attempted to introduce evidence that he was incapable of forming the requisite specific intent for unpremeditated murder because of extreme sleep deprivation and other pressures.[237] The military judge refused to allow the introduction of this evidence based upon a recent change to military law that sought to disallow the defense of partial mental responsibility.[238] The Court of Military Appeals disagreed, finding that partial mental responsibility may act as a defense to unpremeditated murder by negating the specific intent element that the accused "had the intent to kill or inflict great bodily harm upon a person."[239]

Neither logic nor sound policy seemingly supports a distinction between the defenses of partial mental responsibility and voluntary

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[229]104 U.S. 631 (1881).
[230]*Id.* at 633-34.
[231]*See* MCM, 1984, **Part** IV, para. 43b(2)(d).
[232]UCMJ art. 118(3).
[233]MCM, 1984, **Part** IV, para. 43b(3)(d) ("That the accused knew that death or great bodily harm was a probable consequence of the act"); **see** *Stokes*, 19 C.M.R. at 194-95.
[234]*See supra* notes 111-22 and accompanying text; *contra* ***Stokes,*** 19 C.M.R. at 196-97. Model Penal Code § 2.08(2) takes the contrary view and thus would not permit voluntary intoxication to negate a depraved heart by blotting out knowledge or consciousness of the risk.
[235]26 M.J. 90 (C.M.A. 1988).
[236]*Id.*
[237]*Id.* at 91.
[238]*Id.* (citing UCMJ art. 50a and R.C.M. 916(k)(2)).
[239]MCM, 1984, **Part** IV, para. 43b(2)(d); ***see*** *also* United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989).

intoxication as applied to unpremeditated murder.[240] Suppose, for example, that soldier A attempts to commit suicide because of extreme financial difficulties and job-related pressures. As a result of his failed attempt to kill himself, soldier A temporarily impairs his mental faculties such that he cannot form a specific intent to kill or injure. While still under this impairment, soldier A kills another. Soldier B, facing the same financial and job-related pressures, consumes a large quantity of alcohol. While similarly unable to form a specific intent to kill or injure, soldier B also kills someone. No principled basis exists for distinguishing between soldiers A and B as to their guilt for unpremeditated murder. Indeed, the guilt of each soldier should be determined by focusing upon his particular mens rea or lack of it, and not by examining the voluntary acts performed by each that shaped and limited the mens rea. These latter concerns are more properly the subject of extenuation and mitigation.[241]

Arguments to the contrary—that voluntary intoxication should not operate as a partial defense to unpremeditated murder—have been often made and likewise have merit.[242] Perhaps most important among these contentions is that society is justifiably unwilling to permit an accused who unlawfully takes the life of another to have his potential maximum punishment to confinement drastically reduced because he first became voluntarily intoxicated.[243] As one commentator observed in this regard, an intoxicated accused who commits a homicide may be even "morally worse" than his sober counterpart who commits a similar crime.[244]

More specifically, even the most ardent proponent of re-examining the defense relative to unpremeditated murder would agree that an accused who drinks heavily to gain the nerve to commit a homicide

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[240] *But see* United States v. Vaughn, 49 C.M.R. 747 (C.M.A. 1975) (partial mental responsibility may negate the specific intent requirement for murder under article 118(2) even if voluntary intoxication does not do so, as mental disorders are involuntary and not the result of the accused's actions).

[241] *See generally* R.C.M. 1001(c)(1).

[242] *See, e.g.*, *Roman*, 2 C.M.R. 150 (C.M.A. 1952); The Commentaries to the Model Penal Code §2.08(2) (Tent. Draft No. 9, 1959).

[243] *See generally* Note, *The Negligent Homicide*, 28 Kentucky Law Journal 53 (1939). The maximum punishment to confinement for unpremeditated murder is confinement for life. MCM, 1984, Part IV, para. 43e(2). The maximum punishment to confinement for voluntary manslaughter is ten years. *Id.*, para. 44e(1). As voluntary manslaughter is also a specific intent crime, *id.*, para. 44b(1)(d), voluntary intoxication could similarly act as a partial defense for that lesser offense. The maximum punishment to confinement for involuntary manslaughter, which is a general intent crime, *id.*, para. 44b(2), is only three years' confinement. *Id.*, para. 44e(2).

[244] W. LaFave & A. Scott, *supra* note 106, at 545; R. Perkins, *supra* note 16, at 1000 (discussing Coke and Blackstone).

should not be entitled to the voluntary intoxication defense for an article 118(2) crime.[245] Similarly, an accused who becomes voluntarily intoxicated knowing that he will likely perform acts that are inherently dangerous to others would clearly not be entitled to the defense for an article 118(3) charge.[246] In each case, the accused would have the requisite mens rea—specific intent or knowledge, respectively—for the type of murder alleged regardless of his state of intoxication at the time he perpetrated the killing act.

The foregoing discussion clearly suggests that military law's refusal to allow the partial defense of voluntary intoxication for unpremeditated murder in all circumstances should be re-examined. Indeed, the Court of Military Appeals has all but invited such a re-examination of this aspect of the defense in *United States* v. *Tilley*.[247] Military trial practitioners should be alert to confronting this issue anew, and the military's appellate courts should be prepared to address this question when it is presented to them in an appropriate case.

IV. CONCLUSION

The failure of proof defense of voluntary intoxication is well-established under military law. The defense has two components—voluntariness and intoxication. A lack of voluntariness can be shown when intoxication is the result of mistake, coercion, or a medical prescription. Typically, the courts have taken a functional approach to determine whether the accused was intoxicated. This involves an examination of the accused's conduct in light of the special intent required to commit the charged offense.

Under military law, voluntary intoxication can act as a defense to crimes that require actual knowledge, specific intent, willfulness, or a premeditated design to kill. As a rule, these types of offenses can be identified by examining the respective elements of proof as set forth in the *Manual*. Several exceptions to this rule have established by decisional law or policy. Some of these exceptions are result oriented and inconsistent with coherent theory and analysis. Others are more problematic and should be re-evaluated.

As noted at the outset of this article, much of the military law per-

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[245] *See* R. Perkins, *supra* note 16, at 1008 n.4; *see generally* supra note 48.

[246] *See generally* 2 P. Robinson, *supra* note 14, at § 162(d) (discussing Fain v. Commonwealth, 78 Ky. 183 (1879)).

[247] 25 M.J. 20 (C.M.A. 1987), *cert. h i e d* , 108 S. Ct. 1015 (1988).

taining to voluntary intoxication is apparently well settled. Nevertheless, military practitioners should be prepared to challenge selected aspects of the defense with a view toward changing its more questionable applications. Only through such a catharsis can the conflict between the underlying theory of the voluntary intoxication defense and the practical concerns associated with its application be authoritatively examined and resolved.

COLLECTIVE BARGAINING IN THE FEDERAL SECTOR: HAS THE CONGRESSIONAL INTENT BEEN FULFILLED?

by Major Michael R. McMillion*

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. . . . The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. . . . Accordingly,. . . officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures, or rules in personnel matters?[1]

I. INTRODUCTION

President Roosevelt understood that there were many obstacles that prevented collective bargaining from becoming a reality in the federal sector.[2] Collective bargaining entails a give-and-take relationship between management and unions concerning conditions of employment. This means the parties will assert their demands upon one another, with an expectation of reaching common ground. Some obstacles that inhibit this give-and-take relationship in the federal sector are: 1)Federal laws, rules, and regulations establish the conditions of employment for all federal employees. Should unions be allowed to change these laws? 2) Agency regulations are promulgated to carry out agency missions. Should unions be allowed to negotiate over the substance of agency regulations? 3) Some agencies have a primary function relating to national security. Should unions be

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[1] E. Hagburg & M. Levine, Labor Relations: An Integrated Perspective 166 (1978). This quotation is from a letter from Franklin D. Roosevelt to the National Federation of Federal Employees (1937).

[2] *Supra* note 1.

allowed to alter the working conditions for employees involved in national security? 4) The Federal Government has an inherent right to manage. Should the government abdicate its exclusive right to manage for a system of joint control?

Did Congress consider these obstacles and others prior to enacting the Civil Service Reform Act of 1978 (CSRA)?[3] The CSRA gave federal employees, among other things, the statutory right to collectively bargain in the federal sector.[4] If Congress did consider these obstacles, what limitations did it place on the process of collective bargaining, and have these limitations helped or hurt collective bargaining in the federal sector? After ten years[5] of living with the CSRA, has the congressional intent been fulfilled? Is there a need for further assessment or modifications of the statute, or is the CSRA in line with its proponent's intent?

This article analyzes the congressional considerations that existed prior to granting federal employees the right to collectively bargain, and it considers the impact of collective bargaining on the efficiency of the Federal Government. To do this, one must reflect on why employees collectively bargain. A review of the collective bargaining process in the private sector provides a suitable starting point for discussion.

II. PRIVATE SECTOR COLLECTIVE BARGAINING

A. THE PURPOSE OF COLLECTIVE BARGAINING

W.H. Hutt claimed that the term collective bargaining was first coined in 1891 by Mrs. Sidney Webb in her work on the cooperative movement.[6] Hutt stated that collective bargaining, as viewed by Mrs. Webb, covered negotiations between employers and employees when the employees acted in concert and the employer met a "collective will."[7] H.A. Clegg defines collective bargaining as follows: "The

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[3] Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135 (1982) [hereinafter CSRA or CSRA 1978].

[4] *Id.*

[5] President Jimmy Carter signed the CSRA into law on October 13, 1978.

[6] W. Hutt, The Theory of Collective Bargaining 1930-78 (1980).

[7] *Id.*

subject-matter of collective bargaining is employment. It is collective because employees associate together in order to bargain with their employer. It is called bargaining because each side is able to apply pressure on the other. Mere representation of views or appeal for consideration is not bargaining.''[8]

The pressures unions use to enforce their positions at the bargaining table include such activities as strikes, picketing, work slowdowns, and overtime bans. These weapons all have an economic impact on employers. Employers are not without economic counter-weapons. Employers use lockouts and temporary replacements as effective means of establishing their positions at the bargaining table. Thus, as the Supreme Court emphasized in *H.K. Porter*,[10] the success or failure of collective bargaining depends upon the employees' ability to hold out longer than their employers during an economic seizure!'

A natural consequence of collective bargaining is the collective bargaining agreement that is usually signed at the end of the collective bargaining process. This agreement is an integral part of collective bargaining, for it establishes the rules and procedures that both parties must adhere to for the duration of the agreement. The parties' administration of the agreement takes as much time, if not more, as the negotiations themselves. Successful collective bargaining not only depends on the effectiveness of the parties' economic weapons, but also on the attitude of the employer and the employees' representative in administering the agreement. Negotiation and administration of the agreement should be viewed together when determining the success or failure of collective bargaining.[12]

There are two major theories concerning why employees collectively bargain. Some scholars[13] embrace a monopoly theory, while others[14] express a collective voice/institutional response theory.

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[8]H. Clegg, Trade Unionism Under Collective Bargaining 5 (1978).

[9]*See* American Ship Building Company v. NLRB, 380 U.S. 300 (1965) (discussion of the legal basis for allowing employees to use lockouts).

[10]H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

[11]*Id.* at 108.

[12]H. Clegg, *supra* note 8, at 6.

[13]*See* H. Simmons, Economic Policy for a Free Society (1948); G. Aberler, *Wages Policy and Inflation*, in The Public Stake in Union Power (A. Bradley, ed. 1959); and W. Hutt, The Theory of Collective Bargaining (1930).

[14]*See* A. Hirschman, Exit, Voice, and Loyalty (1971); S. Slichter, J. Healy, and E. Livernash, The Impact of Collective Bargaining on Management 841-78 (1960).

1. Monopoly Theory

The monopoly theory is associated with the monopolistic power of the union to raise wages. The concept is that the unions' driving force is to raise the wages of their constituents above a competitive level. Some economists believe that unions, as monopoly entities, reduce society's output in three ways. First, union-won wage increases cause a misallocation of resources by inducing organized firms to hire fewer workers, to use more capital per worker, and to hire fewer workers of higher quality than is socially optimal. Second, strikes called to force management to accept union demands reduce the gross national product. Third, union contract provisions, such as limits on the workloads that can be handled by workers, restrictions on tasks performed, and featherbedding,[15] lower the productivity of labor and capital. According to the monopoly theory, unions have a negative impact on employers, society, and other employees.[16]

2. The Collective Voice, Institutional Response Theory

The collective voice refers to the use of direct communication by management and union representatives to bring actual and desired conditions closer together. In the job market this means discussing with the employer what conditions ought to be changed, rather than resigning from the job. Employees band together collectively for two primary reasons. First, many important aspects of an industrial setting are ''public goods," that is, goods that will affect the well-being (negatively or positively) of every employee in such a way that one individual's partaking of the good does not preclude someone else from doing so. Examples of public goods are safety conditions, environmental factors, the speed of the production line, formal grievance procedures, pension plans, work-sharing, wages, and promotions. Second, workers who are economically tied to a firm are unlikely to reveal their true feelings regarding working conditions to their employer. The fear of job loss makes individual expression risky.[17]

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[15]Featherbedding refers to practices such as make-work rules, excessive manning, production quotas, and resistance to technology improvements. Such practices, like limitation on subcontracting and work assignments disputes, reflect the desire of employees for job security or increased employment and of unions for institutional survival or increased growth.

[16]*See* E. Chamberlin, The Monopoly Power of Labor (1951).

[17]*See* R. Freeman & J. Medoff, What Do Unions Do? (1984).

B. THE PARTES' RELATIONSHIP

Whether unions collectively bargain to increase wages, to improve working conditions, or a combination of the two, the result is an adversarial[18] relationship between employer and union.[19] Traditionally, collective bargaining in the private sector is viewed as adversarial.[20] This adversarial relationship is protected by federal law.[21] The National Labor Relations Act requires the unions and employers to bargain over wages, hours, and other terms and conditions of employment.[22] All other matters, if not contrary to law, are negotiable at the election of the employers.[23]

Furthermore, the powerful economic weapons used by unions and employers in the collective bargaining arena, when used properly, are sanctioned by statute.[24] Employers have the right to lock out employees in anticipation of a strike when such a strike will cause imminent and irreparable economic loss to the employer or when collective bargaining negotiations have reached an impasse.[25] By closing the plant the employer clearly gains the upper hand; the employer determines when the plant will close, which plant or sections of the plant will close, and more importantly, when the plant will reopen. This powerful weapon helps equalize employer-employee economic relationships during a strike.[26]

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[18] E. Hagburg & M. Levine, *supra* note 1, at 5.

[19] *See generally*, Hobgood, *A Review of Labor-Management Cooperation, and Its Potential for The Federal Government*, 6 Federal Service Labor Relations Review 1 (1983).

[20] *Id.*

[21] National Labor Relations Act, 29 U.S.C. § 157 (1982) [hereinafter NLRA] provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining to other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

See also id. §§ 158-159.

[22] Section 158(d) of the NLRA provides:

> For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

[23] *Id.*

[24] *See* American Ship Building Company v. National Labor Relations Board, 380 U.S. 300 (1965).

[25] *See generally* L. Wilff, Lockout (1965); H. McClintock, *Injunctions Against Sit-Down Strikes*, 23 Iowa L. Rev. 149 (1938); and W. Galenson, The CIO Challenge to the AFL (1960).

[26] *American Shipbuilding Company*, 380 U.S. at 316-17.

Unions' ability to negotiate over the substantive area of wages and to enforce their will by strike is the essence of collective bargaining. Impasses over wages have been the catalyst for many major industrial disputes.[27] Unions can use their protected right to strike when the negotiations with the employer reach an impasse.[28] With the support of the bargaining unit,[29] this potent weapon will bring severe economic pressure on the employer, who needs to keep his business alive.[30] The unions' right to negotiate (over substantive issues) and to strike are the cornerstones of their bargaining power.[31]

A moment's reflection should suggest that unions and employers occupy a level of equity at the bargaining table. This was by no means accidental.[32] It was the intent[33] of Congress to give both parties "equality of bargaining" and to restrict the courts and the National Labor Relations Board[34] from interfering with the "nuts and bolts" of the bargaining process. The Supreme Court stated in *H.K. Porter*[35] that "the basic theme of the Act was that through collective bargaining, the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading to mutual agreement."[36] The Court recognized that agreement was not always possible, but it warned of governmental interference when it stated that "agreement in some cases might be impossible but it was never intended for the government to become a party to the negotiations and impose its own views for a desired settlement."[37] In addition,

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[27] *See* Taft & Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in 1 Violence in America: Historical and Comparative Perspective 221 (H. Grabau & T. Garr eds. 1969).

[28] NLRA, 29 U.S.C. § 157 (1982).

[29] A bargaining unit is a group of employees represented by the union. This group is defined as employees that have a mutual interest, i.e., similar skills, wages, hours, and other working conditions. The group can also be determined by the collective bargaining history between the employer and the union or by the desires of the employees when other factors are equally balanced. *See* NLRA, 29 U.S.C. § 159 (1982).

[30] The success or failure of unions' economic warfare will depend upon the strength or weakness of the unions among their constituents. *American Shipbuilding Company*, 380 U.S. at 316-17.

[31] *See generally id.*

[32] *See* L. Verberg, The Wagner Act: After Ten Years (1945).

[33] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 59 (1947); *see also* S. Rep. No. 573, 74th Cong., 1st Sess. 6 (1935).

[34] The NLRA is administered in the first instance by the National Labor Relations Board [hereinafter NLRB]. The NLRB's principal functions are to conduct secret-ballot elections on the question of whether employees wish to be represented by a union in dealing with their employer and to prevent and remedy violations of the NLRA by both employers and unions. The board consists of five members appointed by the President with the advice and consent of the Senate.

35 H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

[36] *Id.* at 103.

[37] *Id.* at 103-04.

the parties are free to use whatever legal economic weapons are available to them to persuade their opponents and are not forced by the courts or the NLRB to reach an agreement. This point was made clear by the Supreme Court in ***NLRB*** v. ***American*** *National* ***Insurance*** *Company.*[38]

> The National Labor Relations Act is designed to promote Industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever. . . . Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.[39]

The duty to bargain is designed to promote responsible dialogue between the parties; however, economic warfare is often the motivating factor to a successful bargaining session. The key ingredient in this responsible dialogue is good faith bargaining between employers and their unions. In *NLRB* v. *Truitt* ***Manufacturing***[40] the Supreme Court held that "good faith bargaining meant that both parties must make a sincere effort to reach agreement and must participate in negotiations to that end."[41]

In the unions' struggle to gain a place in economic society and to improve working conditions, or in the employers' attempts to retain their traditional authority, collective bargaining implies an adversarial relationship.[42] In the private sector, where the parties are given equality of bargaining by statute,[43] this conflict is stabilized by mutual economic weapons and tempered by the responsibility of employers and unions to bargain in good faith. The NLRA sanctions this conduct in an effort to force the parties to work together in resolving their differences to bring about industrial peace.

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[38]NLRB v. American National Insurance Company, 343 U.S. 395 (1952).

[39]*Id.* at 401-02. *See* also **Terminal Railroad** Assn. v. Brotherhood of **Railroad** Trainmen, 318 **U.S.** 1. 6 (1943).

[40]NLRB v. Truitt 'Manufacturing Co., 351 U.S. 149 (1956). ***See*** *supra* note 22.

[41]NLRB **v.** Truitt, 351 U.S. at 152.

[42]In NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960), the Supreme Court stated that "the parties . . . even granting the modification of views that may come from **a** realization of economic interdependence . . . still proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest." ***Id.*** at 488.

[43]***Supra*** note 28.

The basic assumption of the NLRA is that individual workers lack the bargaining power in the labor market that is necessary to protect their own interests and to obtain socially acceptable terms of employment. The NLRA created a mechanism that would allow the parties to resolve their own problems and to keep the government out of the substantive bargaining process.[44] The Taft Hartley Act[45] was subsequently passed when it was determined that the NLRA tipped the scales of bargaining in favor of unions. Additionally, the Landrum Griffin Act[46] was passed to protect the democratic process in unions so they would better serve their purpose of providing a measure of industrial democracy.[47]

III. FEDERAL SECTOR UNIONS

A. IN THE BEGINNING

Federal sector unions evolved in a manner similar to that of their private sector counterparts. In 1830 blue-collar skilled workers of a government naval shipyard went on strike and demanded a ten-hour workday. The same demands had been won earlier by employees in the private sector. Not only did government workers want to decrease their work hours, but they sought to increase their wages to the level of their private sector counterparts performing equivalent work.[48]

As their private sector counterparts continued to gain strides in the improvement of their working conditions, the federal sector unions followed closely behind.[49] For example, in 1861 Congress enacted the prevailing wage statute, which was then modified in 1862. The 1862 law provided:

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[44] *See* American Ship Building Company v. National Labor Relations Board, 380 U.S. 300 (1985).

[45] The Labor Management Relations Act, 1947 (Taft-Hartley), 29 U.S.C. § 141 (1982) (originally enacted as Act of June 23, 1947, ch. 120 § 1, 61 Stat. 136). The NLRA was not repealed by the Taft Hartley Act, it was only amended.

[46] Labor Management Reporting and Disclosure Act, (Landrum Griffin Act), 29 U.S.C. 401-531 (1982). Because of various abuses within some unions, including misuse and embezzlement of union funds, a lack of internal democracy and procedural decency, and collusion with (and pay-offs by) management, the Landrum Griffin Act was passed to subject union internal affairs to direct and comprehensive federal regulation.

[47] *See* Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 Neb. L. Rev. 7 (1988).

[48] Hampton, *Federal Labor-Management Relations: A Program in Evolution*, 21 Cath. U.L. Rev. 493 (1972); *see also* Cooper & Bauer, *Federal Sector Labor Relations Reform*, 56 Chi.-Kent L. Rev. 509 (1980).

[49] Cooper & Bauer, *supra* note 48, at 510.

> The hours of labor and the rates of wages of the employees in the Navy Yards shall conform as nearly as is consistent with the public interest with those of private establishments in the immediate vicinity of the respective yards, to be determined by the commandants of the Navy Yards, subject to the approval of the Secretary of the Navy.[50]

In the late nineteenth century and early twentieth century, postal unions gained national power and began to lobby Congress in an effort to improve their working conditions and wages. Presidents Theodore Roosevelt and William Howard Taft ceased this political practice by issuing Executive orders known as gag orders.[51] As a result of these gag orders Congress passed the Lloyd-LaFollette Act[52] in 1912. That Act guaranteed the right of federal employees to petition and furnish information to Congress. It also protected federal employees in the exercise of their right to join a union, so long as the union was not affiliated with an organization that imposed a duty to strike against the United States.[53] Though unions had been traditionally viewed as a negative force, Congress's view was that federal employees' unions had a right to exist so long as the unions did not advocate the overthrow of the government and did not impose upon their members a duty to strike.[54] By extension, this Act became the common law of federal personnel practice, giving all government employees the right to join or not to join unions, so long as the unions did not interfere with the operations of the government or advocate its overthrow.[55]

Congress's concern with the public interest was paramount in the passage of the 1862 and the 1912 statutes. Congress was willing to

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[50] *See* J. Spero & S. Sterling, Government As Employer 71-75 (1948).

[51] Hart, *Collective Bargaining in the Federal Sector,* in 4 Labor Relations & Social Problems-Collective Bargaining in Public Employment *5* (2d ed. 1975). The Executive order stated:

> All officers and employees of the U.S. of every description . . . are hereby forbidden, either directly or indirectly, individually or through associations, to solicit an increase in their pay or influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its committees . . . on penalty of dismissal from the government service.

See also E. Hagburg & M. Levine, *supra* note 1, at 14.

[52] Lloyd-LaFollette Act, 37 Stat. *555* (1912), as *amended, 5* U.S.C. §§ 7101-02 (1970). This Act is often referred to as the original authority for recognition of labor organizations in the federal sector.

[53] *Id.*

[54] Hampton, *supra* note 48, at 494.

[55] Subcommittee on Postal Personnel and Modernization, 96th Cong., 1st Sess., Legisl. Hist. of the Federal Service Labor Management Relations Statute, Title VII of the CSRA of 1978, at 1160 (Comm. Print 1978) [hereinafter Legislative History].

increase the wages of the employees of the naval shipyard only when consistent with the public interest, and it was willing to allow recognition of federal unions only when they did not interfere with the operations of the government.[56] These concerns persisted throughout the evolution of collective bargaining in the federal sector.

B. EXECUTIVE ORDER 10988[57]

Despite the passage of the Lloyd-LaFollette Act in 1912,[58] the Federal Government had little in the way of formal policy concerning the relationship between management and employee organizations. President John F. Kennedy believed that the nation was ready for a government-wide policy on labor-management relations in the federal sector.[59] In 1961 President Kennedy appointed a task force to review and advise him on federal employee-management relations.[60]

The task force objective was to determine if employee participation in the formulation and implementation of policies and procedures affecting federal employees contributed to the effective conduct of public business.[61] Concurrently, the task force was to adhere to two primary goals: 1) preserve the public interest; and 2) retain appropriate management responsibilities.[62] The task force concluded that employees, through their representatives, were indeed capable of contributing to a more effective conduct of public business if encouraged by the government to participate in the formulation and improvement of federal personnel policies and practices.[63] Although the task force made positive recommendations to President Kennedy, such recommendations were a compilation of existing procedures presently applied by various executive agencies. The task force took those procedures that best met their objectives and, with minor variations, made them part of their recommendations.[64]

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[56] *See* Hampton, *supra* note 48.

[57] Exec. Order No. 10988, 3 C.F.R. § 521 (1959-1963), *repealed* by Exec. Order No. 11491, 3 C.F.R. § 861 (1966-1970).

[58] *Supra* note 52.

[59] President Kennedy's position was in large part attributable to the growing political strength and vigorous efforts of organized labor. *See* E. Hagburg & M. Levine, *supra* note 1, at 167-68.

[60] President's Task Force on Employee-Management Relations in the Federal Service, Employee-Management Practice in the Federal Service, Staff Report II (1961), *reprinted in* Subcommittee on Postal Personnel and Modernization, 96th Cong., 1st Sess., Legisl. Hist. of the Federal Service Labor Management Relations Statute, Title VII of the CSRA of 1978 (Comm. Print 1978) [hereinafter Task force].

[61] *Id.* at 1179.

[62] *Id.*

[63] *Id.*

[64] *Id.*

Collective bargaining between management and the employees' organizations was an important consideration of the task force.[65] The task force was concerned with the fact that Congress had already decided many of the important matters affecting federal employees that were therefore not subject to unfettered negotiation by officials of the executive branch. The task force concluded that preservation of the public interest and retention of management-appropriate responsibilities could only be achieved by limiting the scope of negotiations.[66] Federal unions were willing to work within these limitations.[67]

Negotiation was the operative word used in the task force's recommendation. Its intent was to have the parties consult and negotiate with one another on personnel policies and working conditions that were within the administrative discretion of the agency's head.[68] The task force did not want to create an adversarial relationship between the parties; therefore, it did not recommend the creation of a third party to settle impasses.[69] The task force emphasized that management's responsibility was to meet and confer with the exclusive representative of the employees.[70] In addition, the task force required approval of all negotiations by the head of the agency before any agreement became final.[71] These were some of the limitations faced by federal workers when the private sector model was transplanted into the federal sector. The task force did not wholly embrace the private sector's model of an "adversarial relationship" of collective bargaining as the need to protect the public interest and to retain appropriate management responsibilities were the task force's uppermost considerations.[72]

Another major limitation that the task force imposed on the negotiation process included requiring all negotiated agreements to recognize several management-retained rights.[73] Included in these rights were management's right to direct employees of the agency; to hire, promote, transfer, assign, and retain employees in positions within the agency; to suspend, demote, discharge, or take other disciplinary action against employees; to relieve employees from duty

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[65] *Id.* at 1192.
[66] *Id.*
[67] *Id.*
[68] *See generally id.* at 1189-93.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 1202.
[73] *Id.* at 1189-93.

because of lack of work or for other similar legitimate reasons; to maintain the efficiency of the government operations entrusted to them; to determine the methods, means and personnel by which operations were to be conducted; and to take whatever action would be necessary to carry out the mission of the agency in emergency situations.[74] The task force also recommended that various agencies, such as the FBI, CIA, and any other agency or office, bureau, or entity within the agency primarily performing intelligence, investigative, or security functions, be excluded from the negotiation requirement for national security reasons if the head of the agency determined that the provisions of the proposed Executive order could not be applied in a manner consistent with national security requirements and considerations.[75] The task force'srecommendations prevented unions from striking and made any agreement that the parties entered into subject to existing or future law and regulations, including applicable policies set forth in the Federal Personnel Manual and agency regulations.[76]

Although the task force concluded that the private sector model of collective bargaining could not be transplanted into the federal sector without the safeguards mentioned above, one of the private sector's underlying principles did make the transition without modification: "let the parties resolve their differences without outside interference.''[77] There was great hesitancy on the part of the task force to create a third-party arbiter for dispute resolutions during the consultation-negotiation process.[78] The apprehension was that the parties would look to the third party for resolutions instead of resolving problems themselves. It was the intent of the task force to force the parties to talk with one another in a sincere resolve to reach an agreement, rather than to rely on an outside source.[79] It was this collective wisdom, not that of a third-party arbiter, that President Kennedy wanted to harness in improving the federal system. It was decided that more information about federal sector bargaining was needed before a third-party arbiter could be created.[80]

President Kennedy approved the task force's findings and recommendations and thus implemented the first government-wide policy[81]

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[74]*Id.* at 1194-1210.
[75]*Id.*
[76]*Id.* at 1194-1210.
[77]*Id.* at 1202.
[78]*Id.*
[79]*Id.*
[80]*Id.* at 1189-93.
[81]Legislative History, *supra* note 55.

relating to labor-management relations in the federal sector. The task force had recognized the difficulty in the wholesale transplant of the private sector model of collective bargaining into the federal sector and adapted accordingly.[82] It was President Kennedy's intent to allow unions to organize in the federal sector and to tap the collective voice in a cooperative fashion rather than to create an adversarial relationship between union and management. The resulting Executive order established a government-wide policy but allowed the agencies to create their own practices in dealing with the unions. It was President Kennedy's intent that negotiations with the unions of the various agencies continue on a unified course. Management was to consult with employees' representatives concerning personnel policies and practices that affected their working conditions, but the final agency decisions were to be made by managers, who managed by the light of public interest.[83]

Executive Order 10988 was a directive that President Kennedy issued, requiring no action by Congress. The task force, consisting of Secretary of Labor Arthur J. Goldberg (Chairman), Civil Service Commission Chairman John C. Macy, Jr. (Vice Chairman), Director of the Bureau of the Budget David E. Bell, Special Counsel to the President Theodore C. Sorenson, Postmaster General J. Edward Day, and Secretary of Defense Robert F. McNamara, developed the findings and recommendations that were subsequently embodied in Executive Order 10988.[84] Congressional involvement at this juncture was minimal.[85]

C. EXECUTIVE ORDER 11491[86]

Executive Order 10988 was evaluated after seven years, and the findings were staggering. Union representation had grown from 29 exclusive units covering some 19,000 employees in 1962 to 2,305 exclusive units in 35 agencies covering 1,416,073 employees (52% of the total federal workforce). Federal agencies dealt with over 130 separate organizations, and there were 1,181 labor-management agreements covering 1,175,524 employees. More than 800,000 employees voluntarily authorized payroll deductions for payment of

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[82] *Id.*

[83] Task force, *supra* note 60, at 1189-93.

[84] *Id.* at 1184.

[85] *Id.* Congressional leaders did send letters to the task force prior to the task force findings and recommendations.

[86] Exec. Order No. 11491, 3 C.F.R. § 861 (1969).

their union dues, in an annual amount exceeding twenty-three million dollars.[87]

Executive Order 10988 made significant improvements in labor-management relations. First, it contributed to a more democratic management of the workforce in that employees had a say in the matters that affected their working conditions. Second, it greatly improved communications between agencies and their employees. This open line of communication between management and employees resulted in improved personnel policies and working conditions in the following areas: scheduling of hours of work; overtime; rest periods; leave; safety; industrial health practices; training; and other matters of significant importance to employees and management.[88] Notwithstanding these improvements, the growth of labor organizations and the decentralized arrangement of Executive Order 10988 caused many problems among the numerous labor organizations.[89] Unions believed that without a centralized body to handle disputed matters, their bargaining power was neutralized.[90] A central body would give the unions a third party to review unsettled disputes between the parties. The unions' concern can be summarized as follows: "We talk, management listens, management does what it wants to do anyway."

A committee[91] studying Executive Order 10988 identified six major areas in need of change. Three of the committee's recommendations of significance to this discussion were: 1) create a central body to administer the program and to make final decisions on policy questions and disputed matters; 2) enlarge the scope of negotiations and implement better rules for ensuring that the scope of negotiation is not arbitrarily or erroneously limited by management representatives; and 3) allow a third party to resolve unfair labor practice complaints.[92]

1. A Centralized Body

The major reason why President Kennedy did not establish a central body for resolving disputes under Executive Order 10988 was to give greater flexibility to agencies in using innovative methods for improving and fostering labor-management relations in their

[87] Study Committee Report and Recommendations, August 1969, which led to the issuance of E.O. 11491. Task force, *supru* note 60, at 1219 [hereinafter Committee].
[88] *Id.*
[89] E. Hagburg & M. Levine, ***supra*** note 1, at 22.

[91] Committee, supra note *87.*
[92] Task force, *supra* note 60, at 1219.

respective agencies.[93] In the developmental stage of his new policy, President Kennedy did not want to close the door on any form of meaningful consideration of issues and problems in the labor-management relations field.[94] Furthermore, President Kennedy did not want the parties to escalate their disputes to a third party without sincere efforts to resolve their disputes.[95]

The 1967-68 President's Review Committee on Employee-Management Relations in the Federal Sector[96] found that without a central authority to rule on policy issues, unreasonable pressure was brought to bear on the labor-management relationship.[97] The inequality of bargaining felt by the labor organizations was a central reason for the creation of an impartial third party.[98] The committee recommended the creation of the Federal Labor Relations Council, consisting of the Chairman of the Civil Service Commission as Chairman of the Council, the Secretary of Labor, an official of the Executive Office of the President, and such other officials of the executive branch as the President could, from time to time, designate in order to ensure effective oversight of the program.[99]

The Council's responsibilities were to administer the entire federal service labor relations program and to make definitive interpretations and rulings, as needed, on any provisions of the Executive order or on major policy issues. Other responsibilities were to entertain, at its discretion and in accordance with such rules as it may prescribe, appeals from decisions on certain disputed matters; to issue appropriate regulations; and from time to time to report to the President on the state of the program and to make recommendations for its improvement.[100]

When the Executive Council was created, it was expected to use restraint in the exercise of its authority and responsibility and to leave the agencies and labor organizations free to work out their differences to the maximum extent possible.[101] The Council would be the "court of last resort" after all other methods of negotiations had failed.[102]

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[93] *Id.* at 1202.
[94] *Id.*
[95] *Id.*
[96] Committee, *supra* note 87, at 1228.
[97] *Id.* at 1219.
[98] *Id.* at 1219-20.
[99] *Id.* at 1221.
[100] *Id.* at 1220.
[101] *Id.*
[102] *See id.*

2. *Impasse Resolution*

Executive Order 10988 did not have a procedure for resolving impasses reached in negotiations. President Kennedy's concern was that if a third party was created to resolve impasses between the parties, the parties would escalate the negotiations to a higher level without hard, earnest, and sincere attempts to settle their differences at the local level.[103] The hope was to have the parties reach agreement through mutual consent and not by direction of a third party. The unions' inability to strike was another factor that forced the parties to remain at the bargaining table until their dispute was resolved.[104] Various methods used by the agencies and unions to resolve their impasses included joint fact finding committees, referral to higher authority within the agency and the labor organization, and to a limited extent, mediation by private third parties. All methods proved useful.[105]

Notwithstanding these methods of resolving impasses, the President's Committee recommended that services of the Federal Mediation and Conciliation Service be extended to the federal sector and recommended the creation of the Federal Service Impasses Panel, a governmental body created to resolve disputes after the FMCS and other methods had failed to bring the parties to the point of agreement.[106] The Panel's major responsibility was to resolve disputes between the parties in light of the public interest rather than the special interest of either party to the impasse.[107] The Panel had the authority to issue recommendations in all disputes. If the Panel's recommendations were not adopted by the parties, the Panel had the power to take whatever action it deemed necessary to bring the dispute to settlement.[108]

The Panel was created to strike a balance between the unions' inability to strike and management's domination at the bargaining table.[109] Unions now had access to an impartial third party that would review the parties' proposals, listen to their concerns, and impose its recommendation.

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[103] *Id.* at 1237.
[104] *Id.*
[105] *Id.* at 1238.
[106] *Id.* at 1238-39.
[107] *Id.*
[108] *Id.*
[109] *See id.*

3. *The Scope of Bargaining*

Labor's major criticism of Executive Order 10988 was that local managers were handcuffed by overly-restrictive agency regulations.[110] This prevented managers from fruitful negotiations over matters that concerned employees at the local level.[111] The Committee determined that true negotiations could take place only when local managers had the authority to negotiate on matters of concern to their employees. It recommended that, except where negotiations were conducted at the national level, agencies should increase, where practical, delegation of authority on personnel policy matters to local managers to permit a wider scope of negotiations.[112]

The Committee recommended that managers be delegated the authority to negotiate and to resolve local disputes.[113] It was recommended, however, that the resolution of certain disputes be referred to the head of the agency for final determination.[114] These disputes would focus on whether a labor organization's proposals were contrary to law, to agency regulations, or to regulations of other appropriate authorities and therefore were not negotiable.[115] The Committee's recommendations gave labor organizations a way to resolve the majority of their disputes at the local level.[116]

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[110] *Id. at 1234.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id. at 1235.*

4. Unfair Labor[117] Practice Resolution

Under Executive Order 10988 there was no method to resolve disputes relating to unfair labor practice charges and alleged violations of the standards of conduct for employee organizations. Both management and unions considered this deficiency a fundamental problem in labor-management relations.[118] The Committee recommended that the Assistant Secretary of Labor for Labor Management Relations be responsible for handling complaints concerning unfair labor practices on the part of either management or unions and for handling alleged violations of the standard of conduct by labor organizations.[119] In addition, the Assistant Secretary of Labor for Labor Management Relations was responsible for unit determination[120] and representation dispute resolution.[121] The committee determined that these duties would benefit both management and unions and that they would bring impartiality, order, and consistency to the process.[122]

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[117] Exec. Order No. 11491 defines unfair labor practices as follows:
Section 19(a) Agency management shall not—
(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this order;
(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment:
(3) sponsor, control, or otherwise assist a labor organization,. . .
(4) discipline or otherwise discriminate against an employer because he has filed a complaint or given testimony under this order;
(5) refuse to accord appropriate recognition to a labor organization as required by this order; or
(6) refuse to consult, confer, or negotiate with a labor organization as required by this order.

Section 19(b) A labor organization shall not--
(1) interfere with, restrain, or coerce an employee in the exercise of his rights by this order;
(2) attempt to induce agency management to coerce an employee in the exercise of his rights under this order;
(3) coerce, attempt to coerce, or discipline, fine, or take other economic sanction against a member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an officer or employee of the United States:
(4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;
(5) discriminate against an employee with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin; or
(6) refuse to consult, confer, or negotiate with an agency as required by this order.

[118] Committee, *supra* note 87, at 1230.

[119] *Id.*

[120] *Id.* at 1229-30.

[121] *Id.*

[122] *Id.* at 1230-31.

D. IMPACT OF EXECUTIVE ORDER 11491

Over the next ten years, Executive Order 11491 was amended three times.[123] These amendments collectively provided that every negotiated agreement contain a grievance procedure to cover the interpretation and application of the agreement, that the parties be allowed to negotiate over official time for union contract negotiation, that the agency create provisions for withholding union dues, that the coverage and scope of the grievance procedure be negotiable between the parties, and that the agency's regulations be subject to compelling need determinations. Under this standard, management would no longer be able to preclude bargaining over matters that were in conflict with agency regulations unless the agency could show a compelling need for adherence to the regulation.[124]

Notwithstanding the establishment of third-party machinery for the resolution of disputes and the creation of a central authority for policymaking, Executive Order 11491 maintained the basic principles that were embodied in Executive Order 10988. They both emphasized an open flow of communication between the employers and employees, but neither wanted to dilute the authority of the managers to manage. Executive Order 10988 created neither an oversight agency nor binding arbitration because President Kennedy wanted to leave the final decision regarding the flow and utilization of information to the agencies. Although Executive Order 11491 created an oversight agency and mandated binding arbitration, the agency created was composed of management-oriented officials whose decisions were not reviewable. Thus, final decisions regarding negotiations between the parties were again left to management.[125] The added bureaucracy of Executive Order 11491 was necessary to maintain control and direction of the federal labor program and was not intended to give unions any substantial additional rights.[126]

A casual review of the rights under the Executive orders indicates that the federal sector unions were far from their private sector counterparts in the collective bargaining arena. Management-retained rights, restrictions against strikes, and management-oriented reviewing agencies strongly suggested that collective bargaining, as

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[123] Exec. Order No. 11491 was amended by Exec. Orders Nos 11616, 36 Fed. Reg. 17319, 3 C.F.R. § 605 (1971-1975); 11636, 36 Fed. Reg. 24901, 3 C.F.R. § 634 (1971-1975); and 11838, 40 Fed. Reg. 5743, 3 C.F.R. § 957 (1971-1975). *See* Task force, *supra* note 60, at 1342.

[124] *Id.* at 1258-82. *See also* E. Hagburg & M. Levine, *supra* note 1, at 23-24.

[125] *Id.*

[126] *See supra* note 59.

established in the private sector, did not exist in the federal sector. Furthermore, the rights established under the Executive orders were unenforceable in the courts and were subject to unilateral change or termination by the President.[127] The strongest criticism of the Executive orders was leveled by one of the administrators, W.J. Usery, Jr.,[128] who stated:

> The truth is that there is precious little real collective bargaining in the federal sector--and far too much collective begging.
>
> The truth is that the Executive orders, while well intentioned, will one day be replaced by legislation.
>
> The truth is that unions have generally chosen to use their resources where they will do the most good--on Capitol Hill--rather than fritter them away in the frustrating battle against management rights and the sovereignty of government.
>
> The reason there is so little true collective bargaining in the federal sector is because there is so little that can be bargained for. Congress preempts the economic issues. . . .
>
> Many of the primary noneconomic issues--seniority, job transfers, discipline, promotion, the agency shop, and the union shop, are nonnegotiable--because of a combination of law, regulation, management rights, and the thousands of pages in the Federal Personnel Manual.[129]

Although the collective bargaining process was saddled with limitations and viewed with skepticism by employees, the "right" of federal employees to organize and to collectively bargain in the federal sector was firmly rooted.[130]

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[127] The President has the right to terminate an Executive order.

[128] Formerly Special Assistant to the President and Director, Federal Mediation and Conciliation Service

[129] Address by W.J. Usery, Jr., to the Collective Bargaining Symposium for Labor Relations Executives, Warrenton, VA, July 8, 1974, *printed in* 4 Labor Relations and Social Problems 22 (2d ed. 1975). See also, Cooper & Bauer, *supra* note 48, at 509, 520, 521.

[130] *See generally* Task force, *supra* note 60.

IV. CRITICISM AND SUPPORT OF THE FEDERAL LABOR-MANAGEMENT PROGRAM

A. CRITICISM

No legislation, of course, is enacted in a vacuum, and the Civil Service Reform Act of 1978 (CSRA) was no exception. There were many critics of the Federal Government's labor-management relations program prior to the enactment of the CSRA. One such critic was James A. Brownlow, president of the Metal Trades Department, AFL-CIO, who stated:

> The case of collective bargaining in the Federal Government is basically one of equity and fair play.
>
> Today practically all industrial workers within the areas where the Congress has a right to legislate are enjoying the statutory rights of organization and of genuine collective bargaining through representatives of their own choosing.
>
> It's a sad commentary that the largest employer, the United States Government, has not as yet seen fit to extend the same statutory rights and protection to its own employees.
>
> Once and for all should be eliminated the belief that everything good that the Government worker can obtain comes as a result of either civil-service guaranties or the political spoils system. Rather, there should be an acceptance of the democratic ideal that his interest can best be served by representation through the union of his choice. This is as fundamental for the Government employees as for the worker in private industry.[131]

Another voice against the Federal labor-management program came from the Committee on Labor Relations of Government Employees established by the American Bar Association. That committee submitted a report to the ABA Labor Law Section that provided in part as follows:

> The special legal status claimed for government as an employer which placed government employees in a less advantageous

[131] *Hearing on H.R. 6 before the House Committee on Post Office and Civil Service*, 85th Cong., 2d. Sess., 157-62 (1958).

position than private employees in the area of management-labor relations is an apparent anachronism.

Government, as an employer, has failed in many instances to practice what it compels industry to do. Legislation which denies to government agencies the use of some proper form of ''collective bargaining" procedures so familiar in industry, at least in terms of "collective negotiation," which attempts to restrict unduly the right of employees to organize and to petition the Government for redress of their grievances, needs to review the problem more realistically.

A Government which imposes on other employers certain obligations in dealing with their employees may not in good faith, refuse to deal with its own public servants in a reasonable similar favorable service. It should set the example for industry by being perhaps more considerate than the law requires of private enterprise.[132]

The central theme that dominated most writers' and scholars' criticisms of the federal labor-management relations program can be summarized as follows: 1)The government's labor-management relations policies and practices were out of date. 2) The government should give its employees the same rights private sector employers are forced to give their employees. **3)** The government should be a "model" employer and set the example for others to follow. **4)** Strong employee organizations improve public personnel administration programs and do not weaken them. *5)* The government's approach to labor-management relations has been traditionally negative. **6)** The government's approach to labor-management relations is, in short, basically paternalistic.[133] The critics of the government's labor-management program wanted the Federal Government to establish a collective bargaining program similar to the one created in the private sector.[134]

B. SUPPORTERS

The supporters of the government's labor-management relations policies were, as would be expected, the managerial personnel of the

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[132] Am. Bar Assoc., 1955 Proceedings of the Section on Labor Relations Law, Second Report of the Committee on Labor Relations of Government Employees 2-5 (1955). See Hart, Collective Bargaining in the Federal Civil Service (1961).

[133] *See* Hart, supra note 132, at 9.

[134] *Id.*

Federal Government. For example, at the 1959 Convention of the Society for Personnel Administration, a panel discussion was held on the topic of "Employee-Management Relations in the Federal Service." Management's views were expressed by four speakers: the Under Secretary of Labor, the Chief Counsel of the House Committee on Post Office and Civil Service, the Assistant to the Special Assistant to the President for Personnel Management, and the Director of Civilian Personnel of the Department of the Army.

Their arguments expressed the sentiments of most government officials that collective bargaining could not exist in the federal sector for several reasons. First, federal sovereignty prevents the government from establishing a normal collective bargaining relationship.

> The very nature and purpose of Government make it impossible for employees to bind the administrators and officials of Government in any kind of bilateral agreement, since the Employer, in the last analysis, is the whole sovereign body of people who speak by means of laws enacted by their assembled representatives.[135]

Second, congressionally-established conditions of employment were not negotiable between management and employees.

> Only Congress has the power to fix, change, or adjust salaries under [the] statutes. Congress also determines:
>
> 1. the amount of annual and sick leave
> 2. the number of holidays
> 3. premium pay policies
> 4. retirement benefits
> 5. insurance coverage
> 6. employees' compensation benefits.
>
> These and other benefits, which are the subjects of collective bargaining in private industry, no Federal administrator can exercise the slightest discretion in or over.[136]

Third, Congress deliberately excluded collective bargaining in the federal sector when it passed the **NLRA.**

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[135] *Id.* at 11.
[136] *Id.* at 12.

> [B]oth the Wagner Act and Taft-Hartley Act deliberately excluded the public service. The supporters of these Acts undoubtedly foresaw the unfortunate spectacle of contests of strength between public administrators and public employees and acted to deliberately avoid such a situation.[137]

Finally, federal managers already sought input from employees regarding conditions of employment. "No amount of legislation or policy pronouncements could have brought these relationships into being.... Mutual trust and confidence just don't develop in an atmosphere where each act and phrase must be weighed. ... [S]ound administration is the only possible basis for labor-management relations."[138]

The arguments of both critics and proponents of the federal labor-management program were analyzed by Hart in his book *Collective Bargaining in the Federal Civil Service.*[139] Hart concluded that the opponents were basically on two different levels:

> The critics are arguing on the plane of theory or abstract ideal. They say, "It must be wrong, as a matter of principle, for the world's leading democratic government, which has compelled its own citizens to introduce a large measure of democracy into their private labor-management relations to adhere to paternalistic policies in dealing with its own employees." The fact that the employees concerned are generally dealt with in a generous manner is, they insist, totally irrelevant, even if true.
>
> The defenders' arguments are of a more down-to-earth, pragmatic nature. They are a defense by confession and avoidance. The defenders seem to be saying, "Even if your theoretical criticisms are valid--and we don't admit or deny that they are--they are entirely beside the point because there is nothing which we can do about them. We are bounded by the law of the land which places us in the unique status of being agents of the sovereign. There is nothing we can do to change that status even if we would like to do so. Furthermore, we have a job to do. We have to govern the country. We are getting that job done under the existing ground rules. Nobody is really being seriously hurt by them. But there is no telling how well or

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[137] *Id.*
[138] *Id.* at 13.
[139] See *Hart, supra* note 132.

how poorly the government will be run if meddlesome reformers impose a cumbersome and unfamiliar set of restrictive operating riles upon us in the name of 'collectivebargaining.' If you want the train to run on time you shouldn't harass the engineer."[140]

C. JUDICIAL DECISIONS

Judicial decisions that dealt with collective bargaining between public bodies and employees or organizations representing employees involved states and municipalities rather than the Federal Government.[141] There was enough consistency in these decisions, however, to support the following general principles that apply to any governmental body. 1) Laws and executive regulations that prohibit governmental employees from joining a union or from engaging in any other form of concerted activity, such as striking, picketing, and collective bargaining, are not unconstitutional.[142] 2) Public employees may organize or join unions, including unions that are affiliated with national labor organizations such as the AFL-CIO.[143] 3) Closed shops,[144] union shops,[145] or other forms of union security agreements[146] between a government agency and a union representing its employees are invalid.[147] 4) Any agreement that will give union members preference in hiring, firing, reductions in force, promotions, or any other employment benefit or privilege is invalid.[148]

D. LEGISLATIVE ENACTMENTS

Congressional enactments prior to the CSRA were not always favorable to federal sector employees. The Lloyd-LaFollette Act[149]

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[140] *Id.* at 13-14.

[141] *See* Hart, *supra* note 132.

[142] Fursman v. Chicago, 116 N.E. 158 (Ill. 1917); Seattle High School Chapter No. 20, ATF v. Sharples, 293 P.2d 999 (Wash. 1930); Hayman v. Los Angeles, 62 P.2d. 1047 (Cal. 1936); Jackson v. McLeod, 24 So.2d. 319 (Miss. 1946), *cert. h i e d* , 328 U.S. 863 (1946).

[143] Norwalk Teachers' Assn. v. Board of Education, 83 A.2d. 482 (Conn. 1951); Christie v. Port of Olympia, 179 P.2d. 294 (Wash. 1947). *See also,* Hart, *supra* note 132, at 27.

[144] "Closed shop" means that membership in a union is required as a condition of employment. The closed shop is now illegal in the United States.

[145] "Union shop" means that becoming and remaining a union member is required as a condition of employment after the 30th day of employment or earlier. The union shop is generally legal.

[146] Agency shop is another form of union security agreement. This type of an agreement requires all employees who do not join the union pay a fee in lieu of dues to the union for its services as a bargaining agent.

[147] Los Angeles v. Building & Construction Trades Council, 210 P.2d. 305 (Cal. 1949).

[148] Petrucci v. Hogan, 27 N.Y.S.2d. 718 (N.Y. Sup. Ct. Special Term 1941). *See* also Hart, *supra* note 132, at 27.

[149] *Supra* note 52.

secured the rights of government employees to petition Congress without losing their jobs or suffering a cut in pay. It also gave them the right to join unions that openly engaged in all forms of legitimate lobbying activities in support of congressional action beneficial to government employees.[150] This legislation has not changed significantly since its enactment.[151]

Strikes by federal employees were prohibited by section 305 of the Taft Hartley Act. Section 305 provides:

> It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for re-employment for three years by the United States or any such agency.[152]

The following legislative enactments specifically exclude government employees from their coverage: The National Labor Relations Act;[153] the Fair Labor Standards Act[154] (Wage-Hour Law); and the War Labor Disputes Act of 1943.[155]

The criticism and support of the federal labor-management relations program indicates that individuals and organiby supporters were predicated upon the unassailable principle that managers, if they were to manage successfully, should have the power to manage. Also, the supporters believed that unions should not have the right to impose their will on the sovereign. The openness advocated by those on the outside of the Federal Government was predicated upon the principles that the Federal Government should lead the way in the field of labor-management relations and that private sector collective bargaining was possible in the federal sector. Was there an acceptable compromise?

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[150] *Id.*
[151] Hart, *supra* note 132, at 34.
[152] Taft Hartley Act, 29 U.S.C. § 305 (1982).
[153] NLRA, 29 U.S.C. § 141 (1982).
[154] Fair Labor Standard Act, 29 U.S.C. §§ 201-219 (1982).
[155] War Labor Disputes Act, Pub. L. No. 89, 57 Stat. 163 (1943).

V. TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978

A. INTRODUCTION

Labor-management relations were not the primary consideration of Congress when the Civil Service Reform Act was first introduced.[156] Henry B. Frazier once said:

> [W]ere it not for the passage of the Civil Service Reform Act, we would have no statute now. The reverse is probably just as true: were it not for a Federal Labor-Management Relations Statute, we probably would have no Civil Service Reform Act.[157]

The catalyst for the Civil Service Reform Act was reformation of the civil service system, which was sparked by public opinion that federal employees were under-worked and over-paid. The reform of the civil service system overshadowed labor-management relations reform.[158]

B. PRESIDENT'S TASKFORCE

In 1977 President Carter created the Federal Personnel Management Project to review the federal civil service system and to make recommendations for its reform.[159] The recommendations of the task force regarding federal labor-management relations adhered closely to the priorities and policies that were embodied in Executive Orders 10988 and 11491.[160] The aim of the task force was to keep any new labor management relations program in line with these Executive orders that had worked well for many years.[161] Furthermore, President Carter wanted the system changed, but only to the extent that it strengthened the free flow of information between union and

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[156] President Carter stated, on signing S. 2640 into law in October 1978: "In March, when I sent my proposals to Congress, I said that civil service reform and reorganization would be the centerpiece of my efforts to bring efficiency and accountability to the Federal Government." *See* Task force, *supra* note 60, at 639.

[157] Hart, *supra* note 132, at 520.

[158] *Id.* at 521.

[159] H. Rep. No. 1403, 95th Cong., 2d. Sess. 1, *reprinted in* 1978 US. Code Cong. & Admin. News 2724. The project was divided into nine functional task forces, one of which was to examine ways to improve the Federal Labor Relations System. 1 Personnel Management Project, The President's Reorganization Plan, Final Staff Report [hereinafter task force].

[160] Cooper & Bauer, *supra* note 48, at 522.

[161] *Id.*

management.[162] The task force made the following recommendations: maintain the present scope of bargaining; create one centralized body to administer the program instead of five;[163] and allow an agency shop arrangement, whereby unions and agencies could negotiate representation fees for employees who were not dues-paying members.[164]

On March 2, 1978, President Carter transmitted to Congress his message on civil service reform and included his draft of legislation.[165] His stated purpose for revising labor-management relations was "to make Executive Branch labor relations more comparable to those of private business, while recognizing the special requirements of the Federal government and the paramount public interest in the effective conduct of the public business."[166]

In March 1978 President Carter submitted the proposed labor relations bill to Congress and noted the defects of the existing Executive Order 11491.[167] The defects of Executive Order 11491 centered around the part-time management-oriented Federal Labor Relations Council and the Council's conflicting responsibilities of helping management and at the same time protecting the rights of federal employees.[168] President Carter's proposed plan called for centralizing federal labor management administration in the Federal Labor Relations Authority, which would consist of three full-time Presidential appointees along with a General Counsel to handle unfair labor practices. The President's proposal would also have increased the topics subject to negotiation beyond those negotiable under Executive Order 11491. The additional topics would have included negotiations over grievance and arbitration procedures, paid time for employee-union representatives, work schedules, assignment of overtime, health and safety programs, union dues withholding, equal employment opportunity policy, and discipline policy.[169]

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[162] *Id.*

[163] The five administrative bodies were:
1) Federal Labor Relations Council;
2) Federal Service Impasses Panel;
3) Assistant Secretary of Labor for Labor Management Relations;
4) Department of Labor; and
5) Civil Service Commission.

[164] *See* Cooper & Bauer, *supra* note 48, at 522.

[165] *Id.*

[166] *Id.* at 524 (quoting 36 Cong. Q. Weekly 658-61 (1978).

[167] *Id.*

[168] *Id.*

[169] *Id.*

Congress rejected the President's proposal and substituted an entirely new text for the administration's bill. Congress wanted to move away from merely codifying Executive Order **11491** to broadening the scope of negotiation. It recommended the establishment of a broad new program, which provided that employees, through their unions, be permitted to bargain with agency management throughout the executive branch on most issues, with the exception that federal pay would be set in accordance with the pay provisions of Title **5, U.S.** Code, and fringe benefits, including retirement, insurance, and leave, would continue to be set by Congress.[170]

On August **24, 1978,** the Senate passed its own version of the civil service reform legislation,[171] which more closely resembled the President's original proposal. The Senate version amended the administration's Title VII labor-management provision in several ways. First, it required secret ballot elections prior to imposing a bargaining obligation on any agency. Second, it provided for decertification of any exclusive representative who failed to take action to prevent a strike or slowdown. Third, it allowed employees to hear both sides of the representation question during election campaigns, as long as there were no threats of reprisal **or** coercive conditions. Fourth, it provided for judicial review of the FLRA's unfair labor practice decisions.[172]

Because the House and Senate versions were incompatible, the measure moved to the House-Senate Conference Committee.[173] The Senate agreed to most of the House's provisions, thus expanding the rights of federal employees beyond those contemplated by Executive Orders **10988** or **11491.** Congress, dissatisfied with the way the federal labor-management relations program had worked under Executive Order **11491,** wanted to give labor organizations more latitude in the labor-management arena.[174]

There were two major reasons for granting labor organizations greater rights. First, the management rights clause under Executive Order **11491** was thought to be unnecessary. To this effect Senator Clay stated:

> At no time either during the committee's deliberations or

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[170] *Id.* **at 525.** *See also* **Legislative History,** *supra* **note 55, at 894-967.**
[171] Cooper & Bauer, *supra* **note 48, at 526.**
[172] *Id.*
[173] *Id.*
[174] *See generally* **Legislative History,** *supra* **note 55, at** 931-37.

> afterwards was it suggested that Federal employee labor organizations should be allowed to bargain over every conceivable topic. Initially, disagreement arose over whether the ultimate exercise of genuine management responsibility could best be protected, while also insuring meaningful negotiations on other topics, by inclusion of a management rights clause in title VII, as under the Executive order, or by a case-by-case development as under the National Labor Relations Act.
>
> Many of us believed that a management rights clause was unnecessary. The National Labor Relations Board and the Federal courts have protected private sector management from union demands that "management rights" be bargained away. . . . Since this protection has been afforded private sector management without a management rights clause in the National Labor Relations Act, as amended, we believe that inclusion of such a clause in title VII was unnecessary and would invite the interpretative abuse reflected in the Council's decisions on the order.[175]

Congress thought that the creation of a new independent agency would provide some insulation against the decisional abuse that had hamstrung both agency managers and employee representatives in the past.

Second, Congress believed that the Federal Labor Relations Council's interpretation of Executive Order 11491 was too restrictive and that true negotiation was hampered. Senator Clay further stated:

> As the sectional analysis makes clear, the management rights clause is to be construed as a narrow exception to the general obligation to bargain in good faith. Although reviewing bodies under existing labor management programs have sometimes adopted this approach, the Council has in large measure departed from this canon of construction in its haste to restrict the scope of bargaining.[176]

In its attempt to bring federal sector collective bargaining in line with its private sector counterpart, Congress broadened the scope of bargaining and made the management rights clause the limited exception to the requirement to bargaining in good faith.

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[175] *Id.* at 932.
[176] *Id.*

Although the scope of bargaining was intended to expand under the CSRA and bring federal labor relations on line with private sector labor relations, Congress did exclude some areas from negotiations. Congress recognized that a powerful union could abuse the Federal Government to the detriment of the public interest. Sections were incorporated into the conference bill that excluded certain areas from negotiations. For instance, section 7106(b)(1)[177] permitted but did not require the agency to negotiate over the method and means by which agency operations were conducted. The Senate wanted to prohibit negotiations on these matters but accepted the House version. Also included in the conference bill was section 7106(a)(1),[178] which prohibited negotiations on the issue of the number of employees in an agency under any circumstances. The Senate wanted to permit the agency in its discretion to negotiate on the number of employees in an agency, but it decided to adopted the House version. In addition, section 7106(a)(2)(B) permitted the agency to retain the right to make determinations with regard to contracting out its activities. Finally, Congress added sections 7106(b)(2) & (3).[179] After giving management rights in section 7106(a)(1)&(2), Congress permitted the agencies and labor organizations to negotiate the procedures that management officials would observe in exercising their rights and the appropriate arrangements for employees adversely affected by the exercise of any rights under section 7106.[180] This is commonly called impact and implementation bargaining, i.e., management must negotiate over the impact of its decisions on bargaining unit employees or the procedures management will follow in implementing its decisions. The compromise bill was ultimately passed as Title VII of the Civil Service Reform Act of 1978.[181]

VI. CSRA'S IMPACT ON COLLECTIVE BARGAINING

A. *INTRODUCTION*

A review of the evolution of Executive Order 10988 reveals that its objective (increased communication between management and employees to improve the efficiency of the government) has remained the same, but the methods and means of obtaining this objective have broadened. Executive Order 10988 transformed from a program set-

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[177] 5 U.S.C. § 7106(b)(1) (1982) is the management rights portion of the statute.
[178] 5 U.S.C. § 7106(a)(1) (1982).
[179] 5 U.S.C. § 7106(b)(2)&(3) (1982).
[180] *Id.*
[181] CSRA 1978.

ting forth federal labor-management relations policies with no means of enforcing its application, to a program where an independent agency[182] was created to oversee labor-management relations in the federal sector; from a program requiring only advisory arbitration, to a program requiring a mandatory grievance-arbitration procedure[183] in every collective bargaining agreement; from a program with no means to punish employers who violate the Executive order's policy, to a program where enforcement of the statute is by the General Counsel[184] of the Federal Labor Relations Authority; from a program with no review of the agency's final decisions, to a program allowing judicial review[185] of the FLRAs decisions; and from a program created and terminated at the whim of the Chief Executive, to a program firmly established in the bedrock of federal law.[186]

B. MERGING PRIVATE SECTOR COLLECTIVE BARGAINING INTO THE FEDERAL SECTOR

Collective bargaining in the federal sector took a significant turn toward the private sector upon the enactment of the CSRA. President Kennedy originally wanted the scope of bargaining construed as narrowly as possible, to preserve the public interest and to retain management's appropriate responsibilities. Congress, on the other hand, broadened the scope of bargaining and made the management rights clause the limited exception to the requirement to bargain in good faith. Congress realized, however, that the government could

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[182]5 U.S.C. § 7104(a) (1982) outlines the structure of the Federal Labor Relations Authority [hereinafter FLRA].

[183]5 U.S.C. § 7121 (1982).

[184]5 U.S.C. § 7104(f) (1982).

[185]5 U.S.C. § 7123 (1982).

[186]5 U.S.C. § 7101 (1982), Findings and Purpose. Section 7101 provides:

> The Congress finds that--
> (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
> (a) safeguards the public interest,
> (b) contributes to the effective conduct of public business, and
> (c) facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment; and
> (2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the government.
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

not bargain in the same manner as private sector employers.[187] Therefore, Congress imposed some limitations on the scope of bargaining but maintained the basic principle of openness.[188] These concepts combined (openness and restrictiveness) have made federal sector labor-managment relations an adversarial and complex field of law. The complexity of federal sector labor-management relations is seen in the approach the parties must take to detemine what is negotiable.

The parties can only negotiate over conditions of employment. Conditions of employment are defined[189] as

> personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except such terms do not include policies, practices, and matters—
> (a) relating to political activities prohibited under subchapter III of chapter 73 of this title;
> (b) relating to the classification of any position; or
> (c) to the extent such matters are specifically provided for by federal statute.[190]

The confusing part is not determining what Congress expressly excluded from conditions of employment but what Congress intended to include as a condition of employment and subject to negotiation. For example, in *AFGE v. OPM*[191] the issue was whether a union's proposal concerning the creation of a day care facility for unit employees' children was negotiable. The court, in rejecting the agency's argument that a day care center was within the management-retained right to determine its budget and was not a condition of employment, held that the union's proposal concerning the day care facility impacted on conditions of employment and was therefore negotiable.[192] In contrast, a union proposal requesting negotiation over the use of recreation facilities was held to be nonnegotiable because it did not impact on conditions of employment.[193]

Even though a matter may concern a condition of employment, it must have a substantial impact on conditions of employment before

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[187] E. Hagburg & M. Levine, *supra* note 1.
[188] *Id.*
[189] 5 U.S.C. § 7103(12) (1982).
[190] *Id.*
[191] OPM v. AFGE Local 32 and FLRA, 706 F.2d. 1229 (D.C. Cir. 1983).
[192] *Id.*
[193] U.S. Air Force v. AFGE, 16 F.L.R.A. No. 335 (1984).

it is negotiable. The FLRA created the substantial impact test in *Social Security Administration* v. *AFGE*.[194] In that case the union requested negotiations over a unilateral management decision to move the employees' sign-in sheet some 100 feet to another location. Management wanted to move the sign-in sheet to a location where a management official could observe the employees as they signed-in. In refusing to grant the union's request for negotiation on the matter, the FLRA held that the movement of the sign-in sheet did not have a substantial impact on the conditions of employment and therefore was nonnegotiable.[195]

Congress withheld from the scope of bargaining any rights it determined that management needed to carry out the responsibilities of the Federal Government. These rights included the agency's rights to determine its mission,[196] budget,[197] organizations,[198] and internal

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[194]Social Security Administration, 2 F.L.R.A. No. 237 (1979). *But see* AFGE v. OPM, 33 F.L.R.A. No. 41 (1988), where the Authority developed a new standard ("vitally affect") to determine if a union proposal is negotiable. Under this standard a proposal is negotiable if it "vitally affects the working conditions of bargaining unit employee" and is consistent with law and regulation. *Id.* at 337. This standard is the standard applied by the NLRB.

[195]*Id.* at 243.

[196]"The mission of the agency," the Authority said in the Air Force Logistic Command case, 2 F.L.R.A. No. 77, is "those particular objectives which the agency was established to accomplish." *Id.* at 618. The mission of the Air Force Logistics Command, for example, is the providing of logistical support to the Air Force. *Id.* Not all of any agency's programs are part of its mission. An EEO program was held not to be directly or integrally related to the mission of the Air Force Logistics Command.

[197]The meaning of budget is not defined in CSRA nor in its accompanying reports or recommendations. In the Air Force Logistics Command case, the agency contended that a proposal requiring the activity to provide space and facilities for union-operated day care centers interfered with the agency's right to determine its budget. In rejecting this contention, the FLRA said that a proposal does not infringe on an agency's right to determine its budget unless (a) the proposal expressly prescribed either the programs or operations the agency would include in its budget or the amounts to be allocated in the budget for the program or operations or (b) the agency "makes a substantial demonstration that an increase in costs is significant and avoidable and not offset by compensating benefits." *Id.* at 608.

[198]There have been no cases specifically defining the term "organization." However, in Congressional Research Employees Assn. and The Library of Congress, 3 F.L.R.A. No. 117 (1980), the FLRA held that a union proposal that would require the agency to create four, instead of two, sections in its American Law Division and would mandate that each section be assigned a Section Coordinator violated management's right to determine its organization. *Id.* at 738.

security practices[199] and to assign,[200] direct,[201] suspend,[202] or to remove employees.[203] Thus, any union proposal that interfered with a management-retained right was nonnegotiable. These rights were the limited exception to bargaining in good faith and were not to be used as a bar to fruitful negotiations.[204]

Congress did not want the agencies to foreclose bargaining on every managerial decision. Congress believed that employees' participation in some managerial decisions that affected personnel policies would improve the efficiency of government operations. Therefore, in addition to the management rights clause, Congress encouraged bargaining at the election of the agency on some management-retained rights. This permissive area of bargaining included bargaining at the election of the agency, over the numbers, types, and grades of employees or the positions assigned to any organizational subdivision, work project, or tour of duty.[205] Management could terminate bargaining over these rights at any time prior to agreement.

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[199] In INS, 8 F.L.R.A. No. 75 (1982), the union made a proposal concerning a requirement that employees had to furnish information relating to conflict of interest situations. The union acknowledged the obligation to provide this type of information, but proposed that such statements not be made under oath, unless required by law. The Authority found that the proposal concerned a condition of employment, but that it conflicted with the agency's right to determine its internal security practices and was therefore nonnegotiable. Id. at 361-62.

[200] The right to "assign employees" applies to moving employees to particular positions and locations. The FLRA held that the union's proposal that required management to rotate work assignments weekly was nonnegotiable because it conflicted with management's rights within the meaning of section 7106(a)(2)(A). See AFGE Local 659 and Department of Treasury, 3 F.L.R.A. No. 43 (1980).

[201] In AFGE Local 32 and OPM, 3 F.L.R.A. No. 784 (1980), the FLRA held that the union's proposal requiring union participation in establishing performance standards through collective bargaining was nonnegotiable in that it violated section 7106(a)(2)(A) of the statute.

[202] In the Fort Dix-McGuire Air Force Exchange case, 2 F.L.R.A. No. 153 (1979), the union proposed that a grievant be allowed to exhaust his appeal rights before a suspension or removal became effective. For instance, management may decide to suspend an employee who is continually late to work. With this proposal, management could not suspend the employee until he had grieved and arbitrated the matter. The FLRA stated the Congress did not intend to preclude negotiation on a proposal merely because it may impose upon management a requirement that would delay implementation of a particular action involving the exercise of a specified management right. The FLRA held that management need not negotiate the decision to suspend or remove but must negotiate the procedures under which it will be done. Id. at 154-58.

[203] *Id.*

[204] 5 U.S.C. § 7106(a) (1982). For a discussion on the application of these rights see AFLC, 2 F.L.R.A. No. 603 (1980) (Missouri); OPM v. AFGE and FLRA, 706 F.2d. 1229 (D.C. Cir. 1983)(budget); Library of Congress, 3 F.L.R.A. No. 736 (1980) (organization); Bureau of Engraving and Printing, 18 F.L.R.A. No. 54 (1985) (internal security practices); and DOD v. FLRA, 659 F.2d. 1140 (D.C. Cir. 1981) (to suspend employees).

[205] *See* 5 U.S.C. § 7106 (1982).

If the union's proposal concerned a condition of employment that was established by statute, it too was nonnegotiable.[206] Congress prevented the parties from negotiating over these matters.[207] This was an attempt to ensure that congressional enactments for the benefit of the masses were not subsequently changed by the parties at the bargaining table. Thus, when the union proposed that its bargaining unit employees be paid for overtime work at twice the basic pay rate, the FLRA held the proposal to be nonnegotiable because it conflicted with the statute that provided overtime to be paid at one-and-one-half the basic rate.[208]

Additionally?Congress prohibited negotiations by the parties over agency regulations, but only to the extent that the agency could show a compelling need for its regulations.[209] The compelling need limitation was confirmed in *NAGE v. DA*,[210] when management refused to negotiate over provisions of its smoking policy embodied in its regulation. The union wanted to negotiate over the areas that the agency wanted to put off-limits to smokers. The FLRA held that the agency could not show a compelling need for its regulation and therefore could not hide behind its regulation to prevent negotiations on the union's proposal.[211]

Congress also excluded certain agencies from the coverage of the CSRA because of national security reasons. These agencies included the Federal Bureau of Investigation?the Central Intelligence Agency, and the National Security Agency. In addition, Congress gave the President the authority to exclude any other agency or subdivision from the coverage of the CSRA if the agency's primary function included intelligence, counter-intelligence, investigative, or national security work.[212]

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[206] 5 U.S.C. § 7117(a)(1) (1982).

[207] *Id.*

[208] Department of Agriculture, 3 F.L.R.A. No. 529 (1980).

[209] 5 U.S.C. § 7117(a)(2) (1982). The compelling need test is found in 5 C.F.R. § 2424.11:

> A compelling need is shown when:
> 1. The agency's rule or regulation is essential (not desirable) to the agency mission, **or**
> 2. The regulation is necessary to maintain basic merit principles, or
> 3. The regulation implements a mandate to the agency in the form of law or other authority that is not discretionary in nature.

See also NTEU and FDIC, 14 F.L.R.A. No. 37 (1984).

[210] NAGE v. Dept. of Army, 26 F.L.R.A. No. 73 (1987).

[211] *See id.* at 599.

[212] 5 U.S.C. § 7103 (3) (1982).

Futhermore, Congress gave the President authority to suspend labor-management relations procedures overseas.[213] This grant of authority gave the President the power to suspend any provisions of the CSRA that interfered with the President's ability to effectuate the policies of the Federal Government overseas. An example of the exercise of this authority appeared in ***NFFE and HQ US Army Korea***.[214] In that case the union wanted to negotiate over the government issuance of ration cards and the requirement that government employees register their vehicles. The Army argued that the matter was not negotiable because the restrictions regarding ration cards and vehicle registration were established by the Status of Forces Agreement entered into by the United States and Korea. The FLRA held that these matters affected conditions of employment and therefore were negotiable. However, the FLRA reminded the government that the President could suspend labor management relations overseas pursuant to the authority established by Congress in the CSRA.[215] As a result of the FLRA decision, Executive Order 12391[216] was subsequently issued by President Reagan, partially suspending federal labor management relations in Korea. The Executive order suspended management's requirement to bargain with the union over any matter affecting the condition of employment.[217]

These restrictions placed on collective bargaining were Congress's attempt to make federal sector collective bargaining closely resemble that of the private sector and at the same time maintain management's appropriate responsibility to manage. Congress believed that the private sector form of collective bargaining could be transplanted into the federal sector with limitations. The result of this effort was the creation of a complicated and technical system of negotiations whereby the union and managers found themselves gridlocked over the technical aspects of the system, caught up in a maze of bureaucracy, and seldom reaching mutual understanding.

An example of the technical and complicated nature of the CSRA can be seen in the ***Aberdeen Proving Ground*** case.[218] This case applied the compelling need doctrine that Congress established in the

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[213] 5 U.S.C. § 7103(b)(2) (1982).
[214] DOD, DA and 8th Army, Korea v. FLRA and NFFE, 685 F.2d. 641 (D.C. Cir. 1982).
[215] *Id.* at 650.
[216] Exec. Order No. 12391, Partial Suspension of Federal Service Labor Management Relations Overseas, 3 C.F.R. 229 (1982).
[217] *Id.*
[218] Federal Labor Relations Authority v. Aberdeen Proving Ground, 108 S. Ct. 1261 (1988).

CSRA. As noted earlier, Congress prohibited negotiations on union proposals that conflicted with an agency's regulation only when the agency could show a compelling need for its regulation.[219] In September 1981 Aberdeen Proving Ground notified the employees' union that Aberdeen intended to curtail operations for the three days after the Thanksgiving holidays, November 27-29, 1981, and that as a result, Aberdeen employees would be placed on forced annual leave for Friday, November 27. Thereafter, Aberdeen met with union representatives to discuss the leave procedures. Union representatives requested that the employees be granted administrative leave instead of being forced to use annual leave. Management replied that administrative leave was not permitted by the relevant rules and regulations and that the issue ''vergedon nonnegotiability.''[220]

The union then filed an unfair labor practice[221] charge with the FLRA, and the Authority's General Counsel issued a complaint alleging that Aberdeen's refusal to negotiate concerning the union's administrative leave proposal was a failure to negotiate in good faith.[222] The administrative law judge held in Aberdeen's favor, concluding that the union's proposal was inconsistent with agency regulations and thus was not subject to negotiation because the Authority had not previously determined under section 7117(b)[223] that there was no compelling need for the regulation. The FLRA reversed, holding that an unfair labor practice charge was properly filed where the government employer undertook a unilateral change in conditions of employment, even though the unions's proposal may conflict with an agency regulation and there had been no compelling need determination. Finding that the regulation was not justified by a compelling need, the FLRA held that Aberdeen had violated its duty to negotiate in good faith.[224]

The court of appeals summarily reversed, based on the authority of its prior decision in *U.S.* Army *Engineer* Center v. *FLRA*. In *U.S.* Army *Engineer* Center the court of appeals wrote that "an examina-

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[219] *Supra* note 209.

[220] *Aberdeen Proving Ground*, 108 S. Ct. at 1262.

[221] Unfair labor practices are actions specified in 5 U.S.C. § 7116 that management and labor unions must avoid in dealing with each other or with employees. Allegations of a ULP are resolved before a representative of the FLRA.

[222] *Aberdeen Proving Ground*, 108 S. Ct. at 1262.

[223] *Id. See* 5 U.S.C. § 7117(b)(1) (1982), which provides: ''[I]n case of collective bargaining in which an exclusive representative alleges no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section . . . the Authority shall determine . . . whether such compelling need exists."

[224] *See Aberdeen Proving Ground*, 108 S. Ct. at 1263.

tion of the history, policies, and, above all, the language of the Federal Labor-Management Relations Act persuades us that Congress meant the section 7117(b) negotiability appeal to be the sole means of determining a compelling need question under the statute."[225]

The Supreme Court in upholding the court of appeals decisions gave this analysis of section 7117(b):

> This plain reading of Title VII is fully consistent with—if not compelled by—the legislative history and asserted purpose of the statute. Title VII strives to achieve a balance between the rights of federal employees to bargain collectively and "the paramount public interest in the effective conduct of the public's business.". . .
>
> Section 7117(b) is carefully constructed to strike such a balance. Under § 7117(b) employees are provided with a means to clarify the scope of the agency's duty to bargain; if the agency then refuses to bargain, the union may seek relief through an ULP proceeding. At the same time, § 7117(b) provides special procedures designed to promote effective government. For instance, under a § 7117(b) negotiability appeal, but not in the ULP forum, the agency that issued the relevant regulation is a necessary party, § 7117(b)(4); the FLRA General Counsel is not a party, § 7117(b)(3); and the negotiability appeal is presented directly to the FLRA, rather than first to an administrative law judge, 5 CFR pt. 2424 (1987). Moreover, a § 7117(b) hearing is an expedited proceeding, § 7117(b)(3), thus resolving doubt as to whether a regulation is controlling as promptly as practicable. Most importantly, requiring that compelling need be resolved exclusively though a § 7117(b) appeal allows agencies to act in accordance with their regulation without an overriding apprehension that their adherence to the regulation might result in sanctions under an ULP proceeding.[226]

In a case where the issue was whether employees were to be granted administrative leave or annual leave the day after Thanksgiving, the procedural maze created by Congress to resolve such an issue was complicated and technical, even for the trained mind. For contract negotiators, most of whom are not institutionally trained in labor law, the procedures are overwhelming. If Congress wanted to

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[225] U.S. Army Engineer Center v. F.L.R.A., 762 F.2d. 409, 417 (4th Cir. 1985).
[226] *Aberdeen Proving Ground*, 108 S. Ct. at 1262-63.

bring federal sector bargaining on line with its private sector counterpart, it did achieve one aspect of private sector bargaining: confrontation and unpredictability.

Another example that illustrates the complexity and unpredictability of negotiations under the CSRA is the FLRAs "acting-at-all'' test.[227] Congress created a management rights section[228] in the CSRA to give management the autonomy it needed to carry out the functions of the government. But at the same time, Congress allowed union representatives to negotiate the procedures that management officials would observe in exercising those rights or the appropriate arrangements for employees adversely affected by the exercise of those rights.[229] The "acting-at-all'' test is a method that the FLRA uses to determine whether a proposal intended by the union to be a procedure is negotiable. The question that the FLRA asks when applying this test is: Does the union proposal provide a procedure for management to follow in exercising its management rights, and if so, does it prevent management from acting at all? If the proposal is intended to be a procedure and it does not prevent management from acting at all, then the proposal would be found negotiable.

The acting-at-all test was first applied in ***American Federation of Government and Army-Air Force Service.***[230] In that case the union proposed that a grievant be allowed to exhaust his administrative remedies under the collective bargaining agreement in the event of a management-imposed disciplinary suspension or removal. The agency, in opposition to the proposal, entrenched its argument in section 7106(a)(2)(A),[231] arguing that the union's proposal was nonnegotiable because the procedure it created would unreasonably delay the exercise of the agency's authority under that section. The FLRA, in coining the acting-at-all test, stated:

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[227] The "acting-at-all" test was first addressed by the Federal Labor Relations Authority in AFGE, AFL-CIO, Local 1999 and AAFE, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 **F.L.R.A.** No. 16 (1979).

[228] 5 U.S.C. § 7106(a) (1982).

[229] 5 U.S.C. § 7106 (b)(2) and (3) (1982) (commonly known as the I & I (impact and implementation) bargaining provision).

[230] 2 F.L.R.A. No. 16 (1979).

[231] 5 U.S.C. § 7106 (a) (1982) provides:

> Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . in accordance with applicable laws . . . to hire, assign, direct, layoff, and retain employees in the agency, **or** to suspend, remove, reduce in grade or ***pay,*** or ***take other disciplinary action against such employees.*** . . .

(emphasis added).

> Congress did not intend subsection (b)(2) to preclude negotiations on all proposals merely because it may impose on management a requirement which would delay implementation of a particular action involving the exercise of a specific management right. Rather, as the [congressional] Conference Report indicates, subsection (b)(2) is intended to authorize an exclusive representative to negotiate fully on procedures except to the extent that such negotiations would prevent agency management from acting at all.[232]

According to the FLRA, ''[i]t is well established that the statutory standard in deciding the negotiability of a proposal is not whether the union's proposal would result in an undesirable or unreasonable delay so as to negate the exercise of a management right, rather, the standard is whether adoption of the proposal will prevent the agency from acting at all.''[233]

The D.C. Circuit adhered to the "acting-at-all" test since its inception. The court noted that the "acting at all standard is a reasonable and natural construction of the statutory language.''[234] However, a recent decision[235] by the D.C. Circuit reversed the FLRA concerning a union's proposal that would have required the activity to postpone implementing a new inspection procedure pending a six-month study by the union to evaluate the impact of the test on bargaining unit employees. The court stated:

> The Union's hold in abeyance proposal is not directed at how the agency will implement its program; it would serve rather to place on the bargaining table the agency's decision as to when to implement its new program. A decision regarding the timing of a program's implementation, however, is part and parcel of the reserved management right to determine the means by which an agency's work will be performed. It is a substantive, and not at all a procedural decision; as such it is reserved by statute to agency management unfettered by collective bargaining obligation.[236]

Again, a simple request by the union (requesting a stay of adverse action) became entangled in the sticky procedural web that Congress created to resolve such disputes.

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[232] 2 F.L.R.A. at 155.
[233] *Id.*
[234] *See* Department of Defense v. FLRA, 659 F.2d. 1140 (D.C. 1981).
[235] U.S. Customs Services v. FLRA, 854 F.2d. 1414 (D.C. 1988).
[236] *Id.* at 1419.

The congressional limitations imposed on collective bargaining coupled with the congressional intent to broaden the scope of negotiations made federal sector collective bargaining complicated, technical, and often unpredictable. Furthermore, because of the requirement of judicial review,[237] collective bargaining involves many layers of review.[238]

Under President's Kennedy's Executive Order[239] these cases would never have reached the D.C. Circuit nor the Supreme Court. If these cases had been decided under Executive Order 10988, management would have informed the unions of its intention not to grant administrative leave after the Thanksgiving holiday or not to grant a stay before imposing a penalty. The unions would have provided input to management regarding management's intentions. Management would have carefully considered the union's input in light of an effective and efficient government and implemented a decision consistent with the same.

If the system is to resemble the private sector model as Congress envisioned, then the bureaucracy created is essential. The private sector model is predicated on an adversarial relationship between two equals.[240] Congress, in an attempt to equalize the bargaining power of the parties in the federal sector, imposed limitations on the collective bargaining process and created an independent structure to enforce the congressional intent. Unfortunately, these limitations have become the focal point of controversy. Managers are holding steadfast to what they believe to be their statutory rights, while unions attempt to erode these rights through continuous litigation. The result is thousands of hours spent quibbling over the right to bargain and time away from doing the public's work.[241]

If employees are secure in their jobs and have the Federal Government to protect their basic needs, i.e., wages and fringe benefits, Congress's sincere desire that employees' representatives and manage-

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[237] 5 U.S.C. §7123 (1982) provides the requirements for judicial review of the FLRA decisions.

[238] Negotiability determinations are reviewed by: 1) Agency; 2) FLRA; 3) Circuit Court; 4) Supreme Court (possibly). ULP determinations are reviewed by: 1) Administrative Law Judge; 2) General Counsel of the FLRA or his designee; 3) FLRA; 4) Circuit Court; 5) Supreme Court (possibly).

[239] *See* full citation at *supra* note 57.

[240] E. Hagburg & M. Levine, *supra* note 1.

[241] *See generally* Address by Constance Homer, Director, United States Office of Personnel, Civil Service Reform Act 10th Anniversary Review And Assessment Conference (May 18, 1988), *reprinted in* The Federal Manager (July 1988).

ment turn their collective attention to improving the efficiency of the government was well founded. However, the bureaucracy and adversarial relationship created by the statute caused a feud between the parties that has made litigation the norm and not the exception. Presently, there are over 400 labor-management relations disputes pending before the various circuit courts of appeals. The FLRA has about 200 cases pending, and the General Counsel of the FLRA has over 1,000 cases pending. Furthermore, as indicated by the ***Aberdeen*** case above, various cases reach the Supreme Court.[242]

C. UNEXPECTED RESULTS

Congress's desire, though well intended, has not produced the results expected. Congress carefully drafted a statute to protect the rights of the government to manage and at the same time opened the federal sector to a private sector form of negotiations. In doing so, Congress overlooked the key ingredient, the parties' reactions. Management and unions will naturally interpret the congressional intent and the statute to enhance their self interests, either at the negotiating table or in the administration of their agreement. If the evolution of labor-management relations in the federal sector has demonstrated anything, it is management's reluctance to concede power and the unions' desire for more power.[243] Managers, under the auspice that managers are better trained to determine what is best for the government, will attempt to limit the union's intrusion into their area of control as much as possible. Unions, on the other hand, will attempt to broaden the scope of negotiations to gain a voice in the decisions that affect their members' working conditions. The complicated and technical statute created by Congress will be the primary tool used to effectuate the parties' individual desires.

Manipulating the statute to achieve a desired result can best be seen in the training received by both parties. For managers, though there is always a discussion on the purpose of the statute and the congressional intent, the primary focus during training is on manage-

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[242] *Id.* at 18. From 1980 to 1987 the General Counsel total case load (ULP and representation cases) has averaged about 5,000 cases per year. The FLRA case load since 1979 has averaged 627 cases per year. The cases include arbitration appeals, negotiability determinations, unfair labor practices appeals, appeals from the Assistant Secretary of Labor for Labor Management Relations, and policy guidance. *See* Ninth Annual Report of the Federal Labor Relations Authority and the Federal Service Impasses Panel (1987).

[243] *See* E. Hagburg & M. Levine, *supra* note 1; see *also* Hart, *supra* note 51.

ment rights and preservation of those rights,[244] while union members are trained to limit management from exercising its rights or told what to do when management rights are asserted as a bar to negotiation. The spirit of the statute is maintained by both parties, but the method given by Congress to further that spirit necessitates confrontation. Hence, improving the efficiency of the government is often not the focus of negotiations as much as flexing one's statutory muscle. This principle was clearly evident in ***AFGE v. U.S. Army Missile Command***,[246] where the FLRA admonished the parties for not working out a technical defect in a proposal submitted by the union that was subsidiary to the basic intent of the provision that both parties had agreed upon. The FLRA stated:

> In this regard, the nonnegotiability of provisions which assign tasks to particular agency personnel is established in long-standing Authority precedent and should be familiar to union and management representatives. . . . Nevertheless, the matter continues to be a source of negotiability disputes before the Authority.
>
> Local parties should conduct their negotiations in a manner which attempts to ensure that provisions will not be disapproved under section 7114(c) based on a deficiency which--as appears to have occurred here—does not go to the heart of the matter upon which the local parties had reached agreement. Union representatives should carefully word their proposals and explain their intent to ensure that the assignment defect present in Provision 6 does not arise. Similarly, management representatives should be able to recognize such potential defects early in negotiations and to signal their willingness to discuss a proposal which eliminates the assignment defect.
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> Effective and efficient labor-management relations is fostered when agency heads explore alternative, constructive processes which will enable them to avoid disapproval of provisions like

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[244] *See* Labor Relations for Executives, Training Manual (1988). There is a movement in the federal sector to have joint training programs. The U.S. Office of Personnel Management, Chicago region, is holding the first government sponsored joint union-management training seminar, entitled "Building Productive Labor-Management Relations: A Joint Problem-Solving Approach." The two day seminar is designed to enable federal managers, supervisors, and union officials to develop and use a productive, problem-solving approach to labor-management issues in the workplace. ***See*** U.S. OPM Chicago Region Letter (August 22, 1988).

[245] Telephone interview with Stephen Gordon, Chief Counsel, National Federation of Federal Employees (September 15, 1988).

[246] AFGE v. U.S. Army Missile Command, 27 F.L.R.A. No. 14 (1987).

> Provision 6 when the defect in the provision does not appear to be central to the provision's basic intent.[247]

Giving employees a voice in the creation of personnel polices that affect their lives in order to improve the efficiency of the government was President Kennedy's original intent when he signed Executive Order 10988. The Executive order has evolved into a bureaucratic nightmare that frustrates labor-management relations in the federal sector and inhibits the efficient operation of the Federal Government.

VII. CONCLUSION

Private industry has realized that an adversarial relationship between union and management does not spell success for the company.[248] Major companies are moving away from an antagonist relationship to a more cooperative means of management.[249] Letting the employees have a voice in the direction of the company or a share of its profits is the new approach to labor-management relations in the private sector.[250] Quality circles[251] and the team concept have been introduced with amazing results.[252]

Examples of the effective use of a quality circle and profit sharing are the programs instituted by the Dana Corporation.[253] In 1982 Dana Corporation's Hyco plant in Ashland, Ohio, was losing one million dollars a year at its hydraulics cylinder manufacturing facility. There were many labor disputes throughout the years over various issues, and the labor-management feud was disrupting productivity. Management began looking for new ways to save the dying company. It established voluntary teams (quality circles) of nonmanagement and management people that met weekly to find solutions to production and work environment problems. The quality circle involved over one-half of the company's workforce. In addition, Dana Cor-

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[247] 27 F.L.R.A. at 81-82.

[248] *See* Department of Labor, U.S. Labor Law and the Future of Labor-Management Cooperation, BLMR 113 (Aug. 1987); Department of Labor, Cooperating for the Future: A New Dimension in Labor-Management Relations, BLMR 112 (Feb. 1988); Department of Labor, U.S. Labor Law and Future of Labor-Management Cooperation, BLMR 104 (Jun. 1988); and Department of Labor, New Directions for Labor and Management, BLMR 120 (Jul. 1988).

[249] *Id.*

[250] *See* Greiner, *Quality Circles,* 6 Federal Service Labor Relations Review 1 (1983).

[251] For a discussion of Quality Circles see Berger & Shores, Quality Circles: Selective Readings (1986).

[252] *See generally* material cited at *supra* note 248.

[253] Department of Labor, Labor-Management Cooperation Brief, No. 7 (July 1986).

poration created a gainsharing plan to allow its employees to share in the profits of the company based on month-to-month improvements in plant productivity. As a result of the quality circles and the gainsharing plan, the Dana Corporation remains open and is turning a profit.[254]

The federal sector has always lagged behind its private sector counterpart in the field of labor-management relations, and the federal sector lags in the field of cooperative programs as well.[255] There are some cooperative programs[256] in the Federal Government. One of the most noted programs is between the IRS and NTEU.[257] In an effort to counter the adversarial and litigious relationships that developed between the parties, IRS and NTEU entered into several successful cooperative arrangements, which included an incentive pay program for data entry employees, a day care program for the children of employees, and the joint drafting of reemployment guides to address potential staffing imbalances and training needs resulting from automation. The reports on these initiatives have been favorable, and the experiments provide useful models for others in the federal sector who wish to address similar concerns.[258]

In order for labor-management cooperative programs in the federal sector to be successful, some impediments[259] must be overcome. First, the distrust that has developed between management and unions over the years must be eliminated.[260] This distrust has been brought about by management and unions holding steadfast to the rights given to them under the statute and by their unwillingness to forsake any guaranteed rights.[261] Management and unions must understand that the success of labor-management relations depends upon

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[254] *Id.* While the gain sharing and quality circle programs were deemed successful. the Ashland plant was unable to overcome some of its higher costs and the company transferred a substantial portion of its business to other, more cost-effective plants.

For other companies that have used the quality circles and gain sharing approach, see Department of Labor, Labor Management Cooperation Brief, No. 12 (Jan 1988) (Dayton Power and Light Corporation where labor compact was reached); Department of Labor, Labor-Management Cooperation Brief, No. 15 (April 1988) (Team Concept); and Department of Labor, Labor-Management Cooperation Brief, No. 1 (July 1984) (XEROX used union-management collaboration to cut costs without layoffs).

[255] *See* Hobgood, *supra* note 19, at 49-50.

[256] Department of Labor, U.S. Labor Law and the Future of Labor-Management Cooperation, BLMR 119 (October 1987) (cooperation at NASA Lewis Research Center; cooperation at the Forest Service, USDA; and cooperation at Keesler Air Force Base).

[257] *Id.* at 6.

[258] *Id.* at 7-9.

[259] *Id.* at 2.

[260] *See* Hobgood, *supra* note 19, at 46.

[261] *See generally* Department of Labor, *supra* note 256.

both parties working together as a team.[262] This means that each party must be willing to relinquish rights given to them under the CSRA if they truly want to improve the efficiency of the government.

Second, the employees and their representative must be assured that the cooperative program will not result in the loss of employment because of the efficient running of the government.[263] This problem relates to the trust factor stated above. Employees must trust that their employers will not forget their efforts to improve the efficient operation of the government when jobs cease to exist due to employees' efforts.

Third, managers as well as unions must be willing to abdicate some authority without the fear of losing control.[264] This will entail a new way of approaching labor-management relations for both parties. The parties will have to approach the bargaining table with a cooperative attitude instead of the antagonistic attitude that has persisted in labor-management relations for a long time. To acquire such attitudes the parties should establish joint planning and training sessions and other occasional meetings between them to help alleviate any tension between the parties.

Fourth, the laws must be changed to foster a cooperative rather than an adversarial form of labor-management relations. As noted above the statute has delineated rights belonging to both parties and restrictions on what is and is not negotiable. This delineation of rights has caused both parties to become adversaries.[265] The law must be changed to establish a procedure that both management and unions will follow to resolve concerns over conditions of employment. These procedures should provide for equal access by both management and union representatives, with final review and resolution by a local joint committee composed of management and union officials.

The laws must also be changed to allow the parties more flexibility to negotiate on a variety of issues. These issues include all wages

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[262] *See* Greiner, *supra* note 250, at 54, where, when talking about the benefits of quality circles, he stated that "[w]ith a quality circle program you can develop leadership not only of supervisors, but of the circle participants. The quality circle concept inspires more efficient teamwork, promotes job involvement, and increases employees' motivation."

[263] *See* Hobgood, *supra* note 19, at 49, stating that with a non-defense shrinking budget, the impact on job security is particularly difficult to deal with in the public sector. Improved productivity poses a political issue of job loss to the union.

[264] *Id.* at 48.

[265] Department of Labor, *supra* note 256.

and fringe benefits. Allowing the parties to negotiate on these issues would give the cooperative mode of negotiations a chance to thrive in the Federal Government.[266]

In addition, the CSRA would have to be changed to allow management to negotiate directly with employees. The CSRA makes it an unfair labor practice for management to bypass the union and negotiate directly with bargaining unit employees.[267] The only way cooperative programs will work in the federal sector is for management and employees or employees' representatives to bargain over cooperative methods.[268] The laws must change to allow management to deal directly with employees, with or without union participation, or management and union must improve their communication to ensure unlawful bypass is avoided.

The cooperative method of labor-management relations gives the employees a voice in the personnel polices and practices that affect their lives. At the same time, this method will focus the energy of management and union on the issue of improving the efficiency of the government rather than on fighting for a bigger slice of the negotiating pie. Employees would have a stake in the outcome of the cooperative programs and would put forth greater effort to ensure the programs' success. This method of labor-management relations is far better than a labor-management relations program predicated on adversity.[269]

Employees' involvement in the personnel matters that affect their lives has been determined to be essential to the operation of a more effective and efficient form of government.[270] Arriving at this realiza-

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[266] *Id.* at 17-39.

[267] A management initiative to deal directly with bargaining unit employees is called unlawful bypass. 5 U.S.C. 7116(a) (1982) states:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency—(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter. . . . (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.

See Defense Logistics Agency and Laborers International, case No. 9-CA-2024 (1983), ALJ Decision Reports, where an Administrative Law Judge (AW) held that management unlawfully bypassed the union when it unilaterally implemented a quality circle. The ALJ stated that the "quality circle unlawfully intrudes into the union's province to solicit and resolve employee complaints" and concluded the quality circle was nothing more than an attempt by the agency to bargain with the employees. *See also* Department of Labor, *supra* note 256.

[268] *See generally* Department of the Navy, Pearl Harbor Naval Shipyard and Hawaii Federal Employees Metal Trade Council, O.A.L.J. No. 87-041 (Mar. 20, 1987).

[269] *See* E. Hagburg & M. Levine, *supra* note 1; and Hart, *supra* note 51.

[270] *See supra* note 186.

tion has been a traumatic experience for some members of the government.[271] Congress, having made the decision to open the federal doors to collective bargaining, attempted, through the limitations placed on collective bargaining, to maximize employee involvement without curtailing the efficient operations of the government.[272] Unfortunately, the procedures created by Title VII of the CSRA have only resulted in an adversarial relationship between the employees' representatives and management.[273] The congressional intent is sound in principle, but the methods used to implement this intent create one result, litigation.[274] In an attempt to squeeze the private sector model of labor-management relations into the federal sector, Congress placed several limitations on the process.[275] It removed certain agencies from the requirements of collective bargaining, it exempted management rights from the scope of collective bargaining, and it made union proposals nonnegotiable if they conflicted with statutes, government-wide rules or regulations, or agency regulations for which a compelling need was shown. These restrictions have become the focal point of labor-management relations and have caused much litigation over the preservation of parties' rights. The parties to the collective bargaining process are so busy protecting their statutory rights that they forget that these rights were granted for a reason: to improve the effectiveness and efficiency of the Federal Government.

The parties must move away from a litigious form of labor-management relations to a cooperative mode, where both sides have a stake in the outcome of the bargaining process. This method should prove (as it did in the private sector[276]) to be a better way of involving employees in labor-management relations and at the same time improve the effective and efficient operation of the government. To do this several impediments must first be overcome, such as the lack of trust between the parties, the unwillingness of management and unions to share control, the problems associated with unlawful bypass, and a change in the personnel laws to allow creative negotiations between the parties. However, overcoming these impediments will not be as difficult as overcoming the initial thought that private sector collective bargaining could not be transplanted into the federal sector.

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[271] *See* **Legislative History, supra note 55.**
[272] *See* **Harnpton,** *supra* **note 48.**
[273] *Supra* **note 246.**
[274] *Id.*
[275] 5 U.S.C. §§ **7101-7135** (1982).
[276] *Supra* **note 261.**

BOOK REVIEWS

THE WHISTLEBLOWERS*

Reviewed by Richard W. Vitaris**

The Whistleblowers should really be titled "The Ethical Resisters." The authors, Myron and Penina Glazer, call whistleblowers "ethical resisters" because they believe that whistleblowers are modern day heroes committed to the principles of honesty, individual responsibility, and concern for public good! Their book is a 258 page homage to whistleblowers and an attack on government and industry. The Glazers believe that whistleblowing is an ethial imperative. They accuse employers, public and private, of vindictively retaliating against "ethical resisters," and they encourage public support for whistleblowing.

The not-so-subtle message of *The Whistleblowers* is that the people who blow the whistle are the "good guys" and management is the "bad guys.'' They wrap their "ethical resisters" in the flag and devote a chapter to how whistleblowing is consistent with the religious beliefs of principal faiths. To the authors, whistleblowing is the religious, ethical, and patriotic thing to do. They leave no room for a contrary view and denigrate such values as loyalty, being a team player, and the need for a chain of command.

This book is so one sided and grossly unfair to management that it loses all credibility by the end of the first chapter. The authors relied heavily upon interviews of whistleblowers in preparing the book's numerous case studies,[2] but they appear to have made little or no effort to obtain management's side of the story. Even where management's contentions were available in the public record, *The Whistleblowers* does not state them. The authors cite nothing that detracts from their near god-like portrait of the whistleblowers described in the case studies.

One example is the case study of Bert Berube, former Regional Ad-

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*Myron Peretz Glazer & Penina Migdal Glazer, *The Whistleblowers*. New York: Basic Books, 1989. Pages: vii, 286. Price: $19.95. Appendix, Notes, Index.

**Labor Counselor, Fort McPherson, Georgia

[1]M. Glazer & P. Glazer, The Whistleblowers 4 (1989) [hereinafter The Whistleblowers]. The authors interviewed 64 whistleblowers and their families. *Id.* at xii. These interviews are cited liberally throughout the text.

ministrator of the General Services Administration (GSA). *The Whistleblowers* relates that Mr. Berube, motivated by his sense of right and wrong and his deeply held religious beliefs,[3] made allegations against the GSA for failure to comply with Office of Management and Budget (OMB) Circular A-109 requiring competitive bidding in all major systems procurement. The book fails, however, to tell the reader that the Merit Systems Protection Board (MSPB) found that Mr. Berube, while pending disciplinary action for on-the-job misconduct, attempted to coerce the Administrator into transferring him by threatening to wage a campaign against the agency in the news media.[4] The Glazers' oversight was not due to faulty research, because they cite the MSPB decision in their notes. *The Whistleblowers* also misleads readers about the findings of the MSPB. It quotes the MSPB's conclusion that the GSA failed to show "that there were sustainable grounds for dismissal"[5] but fails to mention that the Board sustained two charges of misconduct against Mr. Berube. The MSPB described the charges as "exceptionallyserious. . . [involving] conduct which had been engaged in over a long period of time."[6] The only reason Mr. Berube's removal was not sustained was because the Board did not believe the GSA intended to remove him solely on the sustained charges.[7] While Mr. Berube may have had mixed motives, they were not nearly so altruistic as *The Whistleblowers* would imply.

Many of the individuals highlighted by *The Whistleblowers,* such as New York City police officer Frank Serpico who disclosed widespread police corruption, deserve high praise and may well be classified as modern heroes. The problem with *The Whistleblowers* is that it does not present an objective analysis of whistleblowing. The book does not, for example, discuss the problem of employees who attempt to immunize themselves from responsibility for their unsatisfactory performance or misconduct by donning the clothes

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[3] *Id.* at 100.

[4] Berube v. General Services Administration, 30 M.S.P.R. 581 (1986) [hereinafter *Berube I*]. The Board held, however, that Mr. Berube could not be disciplined for making this threat. The Board reasoned that the strong public policy favoring settlements would be disserved by allowing demands made in settlement discussions to form a separate basis for agency disciplinary action.

[5] The Whistleblowers at 227.

[6] *Berube I,* 30 M.S.P.R. 581 (1986).

[7] Berube v. General Services Administration, 37 M.S.P.R. 448 (1988) [hereinafter *Berube II*]. In *Berube I* the Board sustained only a portion of the charges. The issue in *Berube II* was whether the Administrator intended to remove Mr. Berube from federal employment based solely on the sustained charges. The MSPB concluded that he did not.

of a whistleblower, even though that problem recently prompted Congress to narrow the definition of whistleblower.[8]

Whistleblowing is particularly difficult to accept for the Army officer or career Department of the Army Civilian, because loyalty to the nation, the Army, and the organization is an important component of the professional Army ethic.[9] Military training emphasizes the importance of teamwork. To the soldier, going over a superior's head is taboo. It is contrary to military procedure and considered to be disrespectful.[10] Military professionals bring problems to the attention of their chain of command and, where appropriate, they pursue other established means of redress.[11] Unity of command is an important principle of warfare, and soldiers are not in the habit of questioning their superiors' decisions. The inherent tension between the ethic of whistleblowing, espoused by the Glazers, and the values of loyalty, teamwork, and the need for a chain of command cannot be resolved in a book review. Regrettably, *The* Whistleblowers failed to address this important issue. This decidedly unbalanced and incomplete treatment of whistleblowing contributes little to the literature on this contemporary topic.

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[8] The recently enacted Whistleblower Protection Act of 1989, while expanding whistleblower protection in many areas, has narrowed the definition of a whistleblower. Under prior law whistleblowing was defined as "disclosure of information. . .which. . . evidences mismanagement." 5 U.S.C.A. § 2302(b)(8)(A)(ii) (1977 & Supp. 1989). Under the new Act the disclosure must evidence "gross mismanagement" to constitute whistleblowing. 5 U.S.C.A. § 1213(a)(1)(B) (Supp. July 1989).

[9] The Professional Army Ethic consists of:

Loyalty. To the Nation, the Army, and your organization.

Duty. Obedience and disciplined performance despite difficulty or danger.

Selfless Service. Put the welfare of the Nation and mission accomplishment before individual welfare.

Integrity. Honest, uprightness, and an unswerving adherence to standards of behavior.

[10] L. Croker, The Army Officer's Guide 80 (43d ed. 1985).

[11] The Army Inspector General System and the Department of Defense Fraud, Waste, and Abuse Hotline are two examples of avenues for bringing problems to the attention of military authorities.

HONORABLE JUSTICE—THE LIFE OF OLIVER WENDALL HOLMES*

Reviewed by Colonel Edward L. Colby, Jr.**

Honorable Justice—The Life of Oliver Wendall Holmes, by Stephen M. Novick, is one of two Holmesian biographies published this year. This work is the more sympathetic of Holmes. Mr. Novick portrays Holmes as more than mortal—as truly "A Yankee from Olympus."

Holmes, the soldier, is of particular interest to military members because of his Civil War service as an infantry officer from April 25, 1861 to July 17, 1864. He was thrice wounded: Balls Bluff; Antietam Creek; and Chancellorsville. While he may have become disillusioned with the Civil War because of the slaughter, he maintained a high regard for soldiers, those who serve. His greatest tribute to military service was an address he delivered at the Harvard University Law School graduation on Memorial Day, 1895, entitled "The Soldier's Faith":

> But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a course which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.

The speech was heard not only at Harvard, but also read by many around the nation. Some considered it as a jingoistic call to war with Spain. Others, including T.R. Roosevelt, found it to be a tribute to the profession of arms.

Holmes, the attorney, served as legal scholar, practitioner, teacher, writer, and trial and appellate judge. A richer life within the law is difficult to imagine. Novick chronicles this career and the development of Holmesian legal philosophy with accuracy and insight.

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*Stephen M Novick. *Honorable Justice—The Life of Oliver Wendall Holmes.* Boston. Little Brown and Company, 1989. Pages xxxi, 552. Photographs, Notes, Bibliography. Index.

** 'Circuit Judge, Second Judicial Circuit, Fort Stewart, Georgia

After graduation from Harvard Law School in 1866 Holmes alternately practiced law and edited the *American Law Review*. In 1873 he edited the 12th edition of *Kent's Commentaries*. In 1881 he published *The Common Law*, actually a series of lectures that he had delivered the previous year. In 1882 he left the practice of law to teach at Harvard Law School. In December 1882 he was appointed to the Supreme Judicial Court of Massachusetts, where he became the Chief Justice in 1899 and served until 1902.

Next, President T.R. Roosevelt appointed Holmes to the Supreme Court of the United States, where he served from 1902 until 1932. There he played the role of Great Dissenter, which Novick nicely describes. He first assumed this posture in *Lochner v. New York*, 198 U.S. **45** (1905), where he published what is considered by many to be the ablest dissent in American law. (For an interesting analysis of the *Lochner* dissent, see Posner's *Law and Literature* (1988).

Novick provides an insightful examination of Holmes the Justice. Throughout his tenure Holmes stood for freedom of speech and thought for the individual. He accepted reasonable regulation of society by legislatures, state or federal, although he probably thought some of the regulations to be foolish. He was a pillar of the court for over thirty years.

Novick spends considerable time on the social activities and associations of Holmes. Once Holmes reached the U.S. Supreme Court, he experienced frequent contacts with many people who shaped the history of America into the 1950's. He was a friend of President Theodore Roosevelt. (Novick does not address the legal ethics of this relationship.) His law clerks included Dean Acheson and Alger Hiss. Those two gentlemen alone contributed volumes to our history. Other names of importance continually appear. Holmes, as Novick ably portrays, was not cloistered. He was socially and intellectually active within Washington, American, and British society. He was a Justice who maintained contact with the realities of life.

Mr. Novick presents a flattering portrait of Mr. Justice Holmes. Nonetheless, he presents Holmes the Justice in an honest, forthright fashion. From Holmes's theories on judicial review of legislation to Holmes's telling dissents, Mr. Novick gives his readers a tour of American and constitutional history from the Civil War to the Depression.

HONORBOUND*

Reviewed by Major Paul F. Hill**

It is late September 1967. Matthew and Eden Benedict have barely tested their new marriage before their Hawaiian R&R has ended and this young Marine Corps captain must return to complete his thirteen-month tour as an **F-4** fighter pilot in Chu Lai, South Vietnam. The couple unknowingly bids farewell for five and a half years of separate yet similar imprisonment, as Matt endures the hell of non-life as a prisoner at the notorious Long Moc and Hoa Lo camps and Eden must cope with the near neglect and uncertainty of her own existence as a POW wife.

Honorbound is a chronicle of love, courage and honor— between man and woman, husband and wife, and warrior and homeland. Author Laura Taylor deftly details both sides of this touching scenario through the eyes of the prisoner and the wife in alternating stories of the Vietnam prison camps and the Massachusetts and California homefront. And in so doing she produces a moving present-day reminder of the Vietnam War era.

Matt is a dedicated young officer, strengthened by the self-determination and pride of his Cherokee Indian ancestry. Eden is a relatively untested child of privilege, yet full of love and ambition. Their brief courtship and marriage nevertheless creates a powerful mix that aids in their growth and survival. Matt'sagony and loneliness as a POW are matched by Eden's own challenges and choices throughout her vigil in hope of her husband'sreturn. As these lovers reunite and begin to rechart their destiny, we are presented with a keener appreciation of life, love, and loyalty.

A romance novel? In the ***Military Law Review?*** Laura Taylor, an Air Force daughter and the wife of a Top Gun Marine Corps aviator, convincingly demonstrates her understanding of the duty, honor, and sacrifice that are a part of life for every military family member. The author further proves her understanding of the stresses and pressures of the Vietnam War, which she serves up in an apolitical, non-judgmental manner.

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*Taylor, Laura, ***Honorbound***. New York: Franklin Watts, 1988. Price: $18.95. Pages: 371. Publisher's Address: 387 Park Avenue South, New York, N.Y. 10016.

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Honorbound is dedicated in part to the 2400 military families still waiting for news or return of their own members. The book was released in September 1988to coincide with National POW/MIA Day. Several former Vietnam POW's and support groups offer testimonials and praise for the vividness of this fictional account. If you, too, believe that bad dreams can turn good or that true love conquers all, *Honorbound* presents some romantic yet relevant reading for both the service member and spouse.

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

WILLIAM J. MEEHAN II
Brigadier General, United States Army
The Adjutant General

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